Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY J. WOODARD,
Petitioner,

v.

JOHN O. MARSH, Secretary of the Army,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1

Is summary judgment proper when (1) the party resisting the motion has unanswered, relevant discovery and a pending, unanswered Motion to Compel Discovery, (2) summary judgment issues without hearing, and (3) the district court's Order Granting Summary Judgment makes no mention of the relevant facts or the law with respect to Petitioner's claim?

2

May the federal courts disregard an error or injustice committed by a Faculty Board and a violation by the military of its own regulations solely on grounds the reviewing authority over the Faculty Board who approved the Faculty Board's discharge recommendation was not bound by the unfavorable recommendation of the Faculty Board?

3

Should the federal courts defer to an interpretation by the Army of its own regulations that strips those regulations of the safeguard functions they were plainly created to accomplish?

4

Is a reserve Army officer denied procedural due process when no verbatim transcript is made of Faculty Board proceedings and review of Faculty Board findings is based upon an inaccurate and imbalanced synopsis?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Larry J. Woodard (hereinafter "Woodard"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-referenced matter on September 15, 1981 (Petition for Rehearing denied on October 27, 1981).

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals in the case at bar is reported at ____ F.2d ____, Civil No. 80-2300 (5th Cir. 1981). The opinion is reproduced in the Appendix hereto (App. at A-1).[1]

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[1] The Appendix hereto is presented in an appended volume, designated "App."

The trial court's Judgment and Order, signed November 14, 1980, and filed November 18, 1980 are reproduced in the Appendix beginning at App. at A-18.

JURISDICTION

Woodard's petition seeks review of the Judgment of the Court of Appeals entered on September 15, 1981. By Order of October 27, 1981, the Fifth Circuit denied Woodard's Petition for Rehearing. By Order dated January 12, 1982, Justice Byron R. White granted Woodard's Motion for an Order Extending Time to File Petition for Writ of Certiorari to and including February 15, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Constitutional Provisions — The Fifth Amendment of the United States Constitution is reproduced in the Appendix (App. p. A-55).

Statutes — The Mandamus Act, 28 U.S.C. ' 1361, and the Tucker Act, 28 U.S.C. § 1346(a)(2), are reproduced in the Appendix (App. p. A-55).

Regulations — The Army regulations in question, AR 15-6, Chapter 2, ¶ 3-7(a), 3-8(c), 3-10(a) and (b), 3-11, 3-12, 3-13; Army Regulation 635-100, Chapter 3, ¶ 3-20, 3-21(a), (b)(1) and (2); USAICS REG 600-4, ¶ 1-1, 1-2, 1-3, 2-2, 3-7(b), 3-8, 3-9, 3-10 are reproduced in the Appendix (App. pp. A-21-36).

STATEMENT OF THE CASE

A. Nature of the Case

Larry J. Woodard brought this suit seeking reinstatement of his officer's commission in the United States Army Reserve, recall to active duty, promotion credit, payment of back wages and benefits, and correction of the Army's records. Woodard sought relief on grounds that (1) in discharging him, the Army failed to follow its own regulations, (2) the hearing he received violated his right to due process of law under the Fifth Amendment, and (3) the Army's action deprived him of the equal protection of the laws, also guaranteed by the Fifth Amendment.[2] The trial court had jurisdiction of Woodard's claims under the Mandamus Act, 28 U.S.C. § 1361 and the Tucker Act, 28 U.S.C. § 1346(a)(2) (Woodard having waived all claims for damages in excess of $9,999.99).

B. Undisputed Facts

On May 13, 1977, Larry Woodard accepted an appointment as a 2d Lieutenant, Military Intelligence, United States Army Reserve. Woodard was ordered to active duty on October 1, 1977 to begin a two-year term of obligated service. He commenced active duty by attending the Military Officer Basic Course at Fort Huachuca, Arizona. After Woodard, along with three other students, failed a required examination three times, Woodard was referred to a "Faculty Board," a panel of officers appointed to consider the cases of officers who failed to meet academic standards. The Faculty Board is to make findings and recommendations and such recommendations are to be reviewed and approved, modified, or disproved by specified authorities.

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[2] The questions presented in this Petition relate to the first two grounds and the erroneous entry of summary judgment.

The Faculty Board made sixteen findings and two recommendations (App. A-56-A-58). The first four findings were essentially favorable to Woodard in that they established mitigating reasons for Woodard's failure of the examinations.[3] The remaining findings were unfavorable to Woodard, though four (findings 7 - 10) were admittedly not supported by substantial evidence:

> 7. That 2LT Woodard was inducted into the US Army in January, 1971 and was subsequently released approximately four months latter in May, 1971 for medical reasons;
>
> 8. That according to 2LT Woodard's testimony the medical problem was administratively reviewed in 1973 by a Department of the Army board. The review resulted in the decision that 2LT Woodard was medically fit for active duty;
>
> 9. That, in October 1973, 2LT Woodard enlisted in the US Army under a combat arms option. In March 1974, 2LT Woodard initiated action to be released from active duty due to nonfulfillment of his combat arms option contract by the US Army;
>
> 10. That a review of the testimony and subsequent questioning of 2LT Woodard by members of the board revealed numerous inconsistencies, apparent contradictions and often vague responses. These characteristics displayed by 2LT Woodard causes [sic] doubt as to his ability to accurately report facts.

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[3] Woodard attempted though unanswered discovery to learn what findings had been made in connection with the two other students who failed the same examinations and were required to go before the same Faculty Board. A third student was recycled without undergoing the Faculty Board process.

The Faculty Board recommended that Woodard be relieved from active duty and be discharged from his reserve commission. Despite the fact that findings 7 - 10 of the Faculty Board concerning Woodard were not supported by substantial evidence, the Army reviewing authority did not return Woodard's case for corrective action to the Faculty Board that initially considered it or to a new Faculty Board composed of entirely new voting members.[4] Army regulation No. 15-6, Chapter II (App. 21) provides a detailed procedure whereby the Appointing Authority, reviewing Faculty Board actions, may "Take his final action notwithstanding" a "harmless error"; "return the case to the same investigating officer or board for corrective action" in case of a "minor error requiring correction," and, in the case of a "substantial error":

> . . . If the error can be corrected without prejudice to a respondent, the appointing authority may do so, returning the case to the same investigating officer or board for corrective action, if necessary. In case of an error which cannot be corrected otherwise, the appointing authority may set aside the findings and recommendations and refer the case to a new investigating officer or board composed entirely of new voting members.

The Faculty Board is a formal procedure with a majority vote required for recommendations. Findings and recommendations of the Faculty Board are dealt with in USAICS REG 600-4 Paragraph 3-8 which provides (App. at A-34) for numerous safeguards before the findings and recommendations are turned over for review. The regulations specifically provide:

> d. *Findings and recommendations must be supported by substantial evidence,* which is defined as such evidence

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[4] All sixteen findings of the Faculty Board are included in the Appendix (App. A-56-A-58).

> presented during the open session of the board proceedings as a reasonable mind can accept as adequate to support the conclusion. (App. at A-35) (emphasis added)[5]

USAICS REG 600-4, Paragraph 3-7b outlines Board procedures (App. 33). Sub-paragraph (5) provides that those who testify before the Board will be sworn. Sub-paragraph (8) provides that a synopsis will be prepared for the written report of proceedings. USAICS REG 600-4, Paragraph 3-9 provides that a report be made including Board proceedings, findings, recommendations, and a synopsis of testimony and forwarded to the approving authority.

A verbatim record was taken on tape of all testimony given before the Faculty Board in Woodard's case, the testimony was summarized in the record of proceedings, and the Army prepared no written verbatim transcript. The summary, as reviewed by the Appointing Authority, did not contain Woodard's testimony at the Faculty Board in verbatim question and answer form.

Three other students failed the same three academic tests Larry Woodard failed that resulted in his recommendation for Academic Relief. Two were referred to the same Faculty Board that considered Woodard's case. With respect to one of the two, the Faculty Board recommended that the student be relieved from active duty and discharged from Reserve Commission. The Appointing Authority approved this recommendation, as he did Woodard's. With respect to the other student, the Faculty Board recommended retention and the Appointing Authority approved, the student is now serving on active duty as a commissioned officer in the United States Army Reserve. The Army retained and recycled without a Faculty Board hearing the third

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[5] Substantial evidence for findings is also required by AR 15-6, ¶ 3-10(b).

student (besides Woodard) who failed the same three academic tests failed by Woodard.

Larry Woodard was honorably discharged from the United States Army on July 21, 1978. On September 5, 1978, Woodard exhausted his administrative remedies by unsuccessfully seeking relief from the Army Board for the Correction of Military Records.

C. The Disputed Facts

(1) The Army's Failure to Follow Its Regulations

The degree of harm from the Army's violation of its regulations was a disputed fact at the time summary judgment entered. In this connection, at the time summary judgment was entered Woodard had pending interrogatories and requests for admission designed to compare Woodard's status with the status of two students in Woodard's course who were retained by the Army despite failing the same three tests Woodard had failed.[6] Additionally, Woodard, complaining that the military had violated its own regulations, sought by means of unanswered interrogatories to discover precisely what procedural steps the Army took with respect to Woodard.

(2) Denial of Due Process

At the time summary judgment entered, Woodard claimed the Army's procedures had denied him due process, and the Army denied this claim. Unanswered Interrogatories No. 36 and

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[6] At the time the district court entered summary judgment, Plaintiff had pending a Motion to Compel Discovery as to Interrogatory No. 5 of Plaintiff's First Interrogatories and Interrogatory Nos. 35, 36, and 37 of Plaintiff's Second Interrogatories. See the document entitled "Response to Defendant's Motion to Stay Discovery and Brief in Support of Motion to Compel Discovery" included in the Appendix herein (App. at A-37).

37 of Plaintiff's Second Interrogatories sought detailed information concerning the Army's review of the Faculty Board's decision as to Woodard. Within this overall fact issue, disputed fact issues existed as to the accuracy and balance of the synopsis (utilized by the Army rather than a verbatim transcript), the truth of the damaging findings by the Faculty Board concerning Woodard and the degree of confidentiality the Army would insure Woodard concerning publication of the reasons for his discharge.

When summary judgment entered, Woodard was actively resisting the Army's Motion to Stay Discovery and had before the district court a timely and unanswered Motion to Compel Discovery. Woodard had urged to the district court that the blanket stay of discovery requested by the Army was inappropriate and that Woodard might seek additional discovery to that already propounded (App. at 40-41). When summary judgment was entered, the district court had not held oral argument concerning the Army's Motion for Summary Judgment, had not ruled on the Army's Motion to Stay Discovery and had not ruled on Woodard's Motion to Compel Discovery. Woodard had advised the district court:

> We agree with [the Army] that on the simple question of the Motion to Dismiss, discovery is not needed. [footnote omitted] But [the Army] made the choice in November, 1979, to file not simply a Motion to Dismiss, but to couple with it a Motion for Summary Judgment. Obviously, to determine whether there are material facts in dispute, we must discover the material facts. Plaintiff's discovery attempts no moe than this (App. at A-39).

D. **Ruling of the District Court**

The district court granted the Army's Motion to Dismiss and Motion for Summary Judgment in a one-sentence Order that failed to mention either the relevant facts or the law in connection with Woodard's claim (App. at A-18).

E. **The Court of Appeals' Opinion**

In affirming the trial court, the United States Court of Appeals for the Fifth Circuit (1) determined the trial court erred in granting the Army's Motion to Dismiss, since the district court had jurisdiction under the Mandamus Act and under the Tucker Act, but (2) discussed relevant facts and the law and rejected Woodard's assertion that summary judgment was premature on his claims on the merit.[7]

The Fifth Circuit rejected Woodard's complaint of premature summary judgment in Footnote 7 to its opinion. (App. A-10). The court did not discuss the assertion that summary judgment was improper where Woodard, who opposed summary judgment, was engaged in ongoing discovery. The Fifth Circuit mentioned (App. A-1) that the district court's summary judgment ruling failed to make any mention of either the relevant facts or the law with respect to Woodard's claim, but did not reverse on this point. The Fifth Circuit stated:

> Woodard had full notice that the Army was asking the district court to convert the Rule 16(b)(6) motion to a motion for summary judgment, and he has no basis to claim prejudice from the court's consideration of the uncertified administrative record. (App. at A-10).

The remainder of Footnote 7 relates to Woodard's argument (not urged in this petition) that the Army's uncertified administrative record should not have been considered for summary judgment and that the Army should have suffered summary judgment through default in responding to Woodard's Requests for Admission.

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[7] We do not address the Fifth Circuit's ruling that Woodard was not entitled to review concerning his equal protection claim.

As to Woodard's claim the Army failed to follow its own regulations, the Fifth Circuit dismissed two apparent Army violations of its own regulations from which Woodard now seeks a grant of certiorari. First, Woodard contended, and it was conceded, that at least four of the Faculty Board findings were unsupported by substantial evidence and irrelevant.[8] The bottom line of the court's reasoning concerning the Faculty Board's failure to follow Army regulations by including findings that were irrelevant and unsupported by substantial evidence was as follows:

> Woodard nevertheless contends that, had the Faculty Board not considered the four irrelevant findings, it might not have recommended discharge. The Appointing Authority, however, is not bound by the recommendation of the Faculty Board [citing Army regulations]. Thus, it is of no consequence whether the Faculty Board would have given a different recommendation had it not made the four relevant findings. (App. at A-13).

Secondly, the Court disposed of Woodard's contention that the Army had violated its own regulations by approving the Army's "stated" interpretation of the regulations in question; consequently, per Army interpretation of its regulations, no failure to comply with regulations had occurred. Specifically, the Fifth Circuit ruled that Army Regulation 15-6, ¶ 2-3(c), en-

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[8] The Fifth Circuit, acting without benefit of oral argument (as had the trial court before it) erroneously stated: "Woodard raises no serious contention that the twelve relevant findings were insufficient to justify the Appointing Authority's action." (App. at A-13). Indeed, as Woodard reminded the Fifth Circuit in Motion for Rehearing, the Faculty Board had before it ample evidence extremely supportive of Woodard and had made four findings directly supportive of Woodard. Where other similarly students were kept, Woodard certainly may have been kept "but for" the admittedly erroneous findings. See Argument at pp. , *infra*.

titled "Effect of Errors," does not require the Appointing Authority to remand a case for additional Faculty Board proceedings where a substantial error has taken place in the initial Faculty Board proceeding.

The Fifth Circuit rejected Woodard's claim that the lack of a verbatim transcript, or at least, a balanced and accurate synopsis, constituted a denial of procedural due process. The Court held that as a reserve commissioned officer, Woodard had no property interest protected by the due process clause. Additionally, Woodard had no liberty interest protected by the due process clause. The Fifth Circuit's conclusion concerning Woodard's liberty interest was possible only by asserting that Woodard conceded points, or that there were no disputed facts, where Woodard had made no concession and disputed facts remained at the time the trial court entered summary judgment. Specifically, Woodard did not concede the Army would keep confidential its reasons for his discharge and did not concede the reasons given by the Faculty Board by means of its findings, as grounds for the discharge recommendation were true; Woodard, at time of entry of summary judgment, had specifically advised the district court it would seek additional discovery following a ruling denying the Army's request for a blanket stay of discovery.

The Fifth Circuit failed to distinguish the District of Columbia Circuit ruling in *VanderMolen* v. *Stetson,* 571 F.2d 617 (D.C. Cir. 1977) which stated:

> Without a verbatim transcript of the Faculty Board's proceedings, it is of course impossible to review the findings. If, in fact, the summary of the Faculty Board's findings mischaracterized VanderMolen's position, serious prejudice might have resulted. [citing cases] *Id.* at 626.

The Court stated inacurrately that Woodard "did not claim any specific prejudice from the failure to prepare a verbatim transcript; he did not claim that the synposis prepared was in any way inaccurate or imbalanced." (App. at A-17). Woodard's Petition for Rehearing (included at App. pp. A-49-52) specifically advised the Court that its characterization of Woodard's claims was incorrect.

REASONS FOR GRANTING THE WRIT

This Petition presents questions of extraordinary importance. The Fifth Circuit has summarily disregarded the rulings of this Court as well as the District of Columbia Circuit, Second Circuit, and the Fifth Circuit itself concerning entry of summary judgment. Moreover, the ruling on the merits constitutes a departure from the rulings of this Court and the Court of Claims to the effect that the military must comply with its own regulations and failure to do so will result in remedial action by the courts unless the error or injustice is "truly harmless." The Fifth Circuit's interpretation of *Udall* v. *Tallman,* 380 U.S. 1 (1965) would effectively have this Court hold that the federal courts should defer to an interpretation by the Army of its own regulations that strips those regulations of the safeguard functions they were plainly created to accomplish. Finally, the Fifth Circuit's ruling as to Woodard's procedural due process claim was only possible through an abuse of the summary judgment procedure and, in any event, conflicts with the law of the District of Columbia.

I.

THIS COURT SHOULD INSURE AGAINST GROSS ABUSE OF SUMMARY JUDGMENT PROCEDURE

The integrity of the federal judicial system dictates that an attorney — who has opposed defendant's motion for summary judgment, who is in the midst of discovery of disputed, relevant facts bearing on plaintiff's claims, who has made timely response to defendant's motion to stay discovery and who has pending an unanswered motion to compel discovery — should not be obliged to advise his client that the district court, without ruling on the motions to stay or compel discovery, in a one-sentence order that makes no mention of the relevant facts or the law with respect to his client's claim, and without hearing as

to the motion for summary judgment, has entered summary judgment against him. Nor should an attorney be required to advise his client that following appeal, the Circuit Court, conceding the district court failed to explain its reasoning, has confirmed the district court's entry of summary judgment.

This Court, as well as the District of Columbia, Second and Seventh Circuit Courts of Appeal, have long agreed with the above-stated proposition. Moreover, until its ruling in the case at bar, the Fifth Circuit law clearly required reversal of the district court under these circumstances. In *Carter* v. *Staton,* 405 U.S. 669, 671, this Court held:

> Under Rule 56, summary judgment cannot be granted unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. If this is the course the District Court followed, its order is opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellants' claim. In this posture of the case, we are unconvinced that summary judgment was properly entered.

The Fifth Circuit in the case at bar acknowledged that the ruling of the district court in entering summary judgment went beyond "opaque and unilluminating." The Fifth Circuit stated:

> The Army filed a pre-answer "motion to dismiss or, in the alternative, for summary judgment." Without explaining its reasons, the district court granted the Army's motion "in all things," and it entered judgment for the Army. Woodard appeals. Finding a proper legal basis for the district court's judgment, we affirm.

(App. at A-1).

While on the Seventh Circuit, Justice Stevens wrote in *Illinois State Employees Union, Council 34* v. *Lewis,* 473 F.2d 561, 565 (7th Cir. 1972):

> It is, of course, well settled that a district court may not resolve the issues of fact on a motion for summary judgment [footnote omitted] nor should such a judgment be entered until the party opposing the motion has had a fair opportunity to conduct such discovery as may be necessary to meet the factual basis for the motion. [footnotes omitted]

Similarly, the Second Circuit has held:

> At least when the party opposing the motion has not been dilitory in seeking discovery, summary judgment should not be granted when he is denied reasonable access to potentially favorable information.

Quinn v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). *See also Littlejohn* v. *Shell Oil Co.*, 483 F.2d 1140 (5th Cir. 1973); *Washington* v. *Cameron*, 411 F.2d 705, 711 (D.C. Cir. 1969); *Bane* v. *Spencer*, 393 F.2d 108 (1st Cir. 1968), *cert. denied*, 400 U.S. 866, 27 L.Ed. 2d 105 (1970).

In no way can Woodard's discovery efforts be deemed dilitory; indeed, it was the Army that, throughout the entire course of the district court litigation, failed to take timely action. Given the existence of disputed facts concerning whether the Army followed its own regulations, the degree of harm resulting from the acknowledged failure of the Faculty Board to confine its findings to those supported by substantial evidence, as well as disputed fats as to the confidentiality or non-confidentiality of the Army's reasons for discharge, the truth or falsity of damaging findings, and the balance and accuracy of the non-verbatim synopsis of the testimony, Woodard's outstanding discovery was plainly relevant. While the district court wholly ignored the existence of outstanding discovery, failing to rule upon the Motion to Stay and Woodard's Motion to Compel, the Fifth Circuit either ignored the existence of outstanding discovery (as in the case of discovery relating to the

exact procedures the Army used in review of Woodard's case), or concluded on its own and in the face of contradiction in the record, that Woodard did not dispute facts in these areas.[9]

Besides the fact that this Court and various circuits safeguard the integrity of the federal judiciary system by prohibiting summary judgment in Woodard's circumstances, this Court should grant certiorari for another key policy reason. Where a litigant has filed his federal court claim in good-faith, a one-sentence Order granting dismissal and summary judgment, making no mention of the relevant facts or the law with respect to the litigant's claim will often trigger what might otherwise be an unneeded appeal. Under these circumstances, a litigant who can manage financially to appeal is practically honor-bound to do so, since the district court has given not a single reason for rejecting his suit.[10] In short, this Court will foster an efficient, as well as a fair, federal judiciary by considering this issue of procedure.

II.

THE FIFTH CIRCUIT'S NEW PROOF REQUIREMENTS, AT ODDS WITH THE LAW OF THIS COURT, SHOULD NOT STAND

In its effort to identify a "proper legal basis (App. at A-1) for granting summary judgment, the Fifth Circuit, in irreconcilable conflict with the law in this Court, has immunized the military

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[9] This Fifth Circuit technique is particularly troubling given the same court's care in Swilley v. Alexander, 629 F.2d 1018, 1022 (5th Cir. 1980) to safeguard a party resisting summary judgment from issuance of summary judgment where confidentiality and accuracy of discharge reasons were disputed.

[10] In the instant matter, the Fifth Circuit held, as Woodard claimed, that the district court indeed erred insofar as it granted the Army's Motion to Dismiss.

from effective review in instances in which it has failed to comply with its own regulations. Since the Correction Board always has the authority to promote or return officers despite unfavorable recommendations from selection of faculty boards, the Fifth Circuit's *Woodard* ruling means no violation of regulations by these boards is grounds for relief.

This Court in *Harmon* v. *Brucker,* 355 U.S. 579 (1958) held the federal courts may review matters of internal military affairs to determine if an official has acted outside the scope of his powers. The Fifth Circuit, relying in part upon *Harmon* v. *Brucker,* ruled the federal courts may review the action of military officials where the claim is made that military officials have violated their own regulations. *Mindes* v. *Seaman,* 453 F.2d 197 (5th Cir. 1971). *See also Feliciano* v. *Laird,* 426 F.2d 424 (2d Cir. 1970); *Van Bourg* v. *Nitze,* 388 F.2d 557 (D.C. Cir. 1967); *Bluth* v. *Laird,* 435 F.2d 1065 (4th Cir. 1970); *Schatten* v. *United States,* 419 F.2d 187 (6th Cir. 1969).

While conceding in the case at bar that review is permissible on a claim that the military has violated its own regulations, the Fifth Circuit defeated Woodard's claim by altering the principles of review. Until the case at bar, the Fifth Circuit and the Court of Claims had been in agreement in rejecting a "but for" test whereby in order to obtain a remedy when a board has had improper information before it, the officer must prove that but for the existence of the now deleted information, the board would have recommended the officer for promotion. *Compare Johnson* v. *Reed,* 609 F.2d 784, 790-91 (5th Cir. 1980) *with Sanders* v. *United States,* 594 F.2d 804 (Ct. Cl. 1979). In the *Johnson* case, the Fifth Circuit considered an Air Force officer's claim the Correction Board should have voided a passover by a selection (promotion) board since the selection board had improper information before it. The Fifth Circuit's analysis in that case is directly applicable to the case at bar (though the Fifth Circuit abandoned it in considering Woodard's case):

> If the administrative body refuses to excise the contested portion [of the officer's record] at trial the plaintiff must rebutt with clear, cogent, and convincing evidence the presumption that the board acted legally. [citing cases, including Mindes v. Seaman, *supra*]. Johnson is not faced with this presumption because the Air Force itself, through the OPRRB, cleansed Johnson's record of the offending phrase. The second stage is reached once the contested portion of the selection file is removed. The question at this stage is whether the Correction Board was arbitrary and capricious in failing to void a passover by a selection board since the selection board had improper information before it.

Johnson v. *Reed,* 609 F.2d at 790-91. At this point, the Fifth Circuit agreed with the Court of Claims in *Sanders* v. *United States, supra,* and stated:

> Focusing on the language of the Correction Board's enabling statute, the Court of Claims noticed that the Board is charged with correcting *probable* errors or injustices; a but for test in effect would require proof beyond a reasonable doubt that the officer would have been promoted. The *Sanders* court rejected the test as an attempt to turn courts and correction boards into super-selection boards, deciding issues of promotability.

Id. at 791.

Next, in *Johnson* v. *Reed,* the Fifth Circuit joined with the Court of Claims in approval of "a standard for harmless error to avoid windfall recoveries" so that

> under extraordinary circumstances "when the error or injustice was truly harmless, that is, when substantial evidence shows that it was unlikely the officer would have been promoted in any event," the pass over should not be

> voided and the officer should not recover. *Id.* at 818. The court cautioned, however, that this substantial evidence test should not be construed as a rewording of the stricter "but for" test.

Johnson v. *Reed, supra,* at 791, quoting from *Sanders* v. *United States,* 594 F.2d at 804.

This Court in *Mount Healthy City School Dist. Bd. of Educ.* v. *Doyle,* 429 U.S. 274 (1977) has permitted a school board a defense despite a finding that a school teacher's constitutionally protected speech played a "substantial part" in the school board's decision not to renew his teaching contract, by showing by a preponderance of the evidence that the school board would have reached the same decision as to the teacher's reemployment even in the absence of the protected conduct.

In the case at bar, the Fifth Circuit imposed a new method of review where a claim is made that an administrative body has considered improper matter (in this case, irrelevant and unsubstantiated findings of fact). The Fifth Circuit has gone beyond rejecting *Johnson* v. *Reed,* and *Sanders* v. *United States,* by holding that not even a "but for" analysis is required where the review authority (such as the appointing authority over a faculty board or the correction board over a promotion board) is not bound by the unfavorable recommendation. The vehicle for avoiding the "truly harmless" review standard *and* a "but for" test is the Fifth Circuit's notion that Woodard's contention that the Faculty Board might not have recommended discharge absent the flawed and damaging findings is *irrelevant* because:

> The Appointing Authority, however, is not bound by the recomendation of the Faculty Board (citing army regulations]. Thus, it is of no consequence whether the Faculty Board would have given a different recommendation had it not made the four irrelevant findings.

(App. at A-13). This is a sharp departure from the Fifth Circuit/Court of Claim's analysis, since in the *Johnson* v. *Reed case,* the same argument was available, to-wit: it could be argued that it was of no consequence whether the promotion board in *Johnson* considered improper matter since the Correction Board recognized the promotion board considered improper matter and the Correction Board was not bound by the decision of the promotion board.[11]

In fact, the Fifth Circuit expressly rejected this approach, stating:

> In Johnson's action the administrative scions of the Air Force agreed that a cleaning of Johnson's selection folder was warranted, but they failed to permit that cleansing to have any effect.
>
> * * *
>
> The Air Force itself began grinding the remedial wheels when it partially corrected Johnson's selection folder. The Air Force acted arbitrarily and capriciously in failing to void the second pass over. The error was not harmless because the record does not reflect substantial evidence that it was unlikely that Johnson would be promoted.

Johnson v. *Reed,* 609 F.2d 784, 790, 793 (5th Cir. 1980).

Nor is the Fifth Circuit's treatment of the case at bar consistent with its approach in *Jones* v. *Alexander,* 609 F.2d 778 (5th Cir. 1980) where it ruled a defect in a promotion board could properly be remedied by convening a relook board that was properly constituted, having that board examine applications for promotion as they were reconstituted to appear as they had at

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[11] Under federal statute, the Correction Board may correct any error or injustice. 10 U.S.C. § 1552.

the time the proceedings before the defectively constituted board, and with the relook board using the same criteria as used by the original board. The Fifth Circuit's rationale in the case at bar, if applied in *Jones* v. *Alexander, supra,* would have permitted the Correction Board to simply approve the decision of the improperly constituted board, since, in any event, the correction board was not bound by actions of the Promotion Board.

Likewise the Fifth Circuit's *Woodard* ruling is plainly at odds with this Court's approach in *Mount Healthy, supra,* 429 U.S. 274. Far from placing the burden of proof upon the Army to show by a preponderance of the evidence that the Faculty Board would have made the same recommendation or that the Reviewing Authority would have decided upon discharge and removal of Woodard's commission even if the Faculty Board had recommended retention, and far from a ruling that inclusion of flawed and damaging findings by the Faculty Board was "truly harmless," the Fifth Circuit has now erected an impossible barrier for claimants — in order to obtain relief in the federal courts for a violation of the military of its own regulations, the claimant must show that the reviewing authority who dealt with the flaw was bound by an unfavorable recommendation by that board. Since the only military body without a higher military authority capable of modifying actions of subordinate boards is the Correction Board, and since that Correction Board only has appellate jurisdiction, the Fifth Circuit's new standard for review can *never* be met.

The Fifth Circuit's same logic that permitted it to recognize but give no effect to the Faculty Board's violation of its own regulations in this instance would have equally permitted the Reviewing Authority in the Woodard case to approve a dismissal recommendation of the Faculty Board even if the Faculty Board had never met or voted. In the Fifth Circuit, post *Woodard, Harmon* v. *Brucker,* 355 U.S. 579 (1958) is no longer the law.

III.

THE FEDERAL COURTS SHOULD NOT SANCTION A PLAINLY ERRONEOUS ARMY INTERPRETATION OF ARMY REGULATIONS

This Court in *Udall* v. *Tallman,* 380 U.S. 1, 16, reaffirmed the proposition that an administrative agency's interpretation of its own regulation is given controlling weight unless it is plainly erroneous or inconsistent with the regulations. The district court's summary judgment is flawed here, too: The Army had no evidence that the interpretation of the Army regulation in question (AR No. 15-6, ¶ 2-3(c) was actually the Army's administrative interpretation rather than simply a legal argument it propounded when confronted with a problem concerning the regulation in Woodard's case. The Fifth Circuit converts this Court's holding in *Udall* v. *Tallman* into a means for rubberstamping affirmance of administrative decisions.

It is important for the Supreme Court to preserve its requirement that an administrative interpretation be rejected if it is plainly erroneous or inconsistent with the regulation. Army Regulation No. 15-6, ¶2-3(c), dealing with the effect of errors, when considered as a part of the regulatory scheme for academic relief is plainly a regulation designed to furnish vital safeguards to a reserve officer considered for academic review. The Army's interpretation of the statute, which the Fifth Circuit approved (App. at A-15), reduces the detailed Faculty Board procedure to an insignificant formality. It is entirely inconsistent with the Army regulation in question to suggest that a substantial error may be corrected without returning the case to a faculty board for corrective action because:

> (1) The Faculty Board procedures provide express rights to the student to appear, be heard, and have no finding entered absent majority vote. It is only after this process that the Faculty Board may issue a recommendation. The

plain intent of the regulatory scheme is to give each student at least one unflawed Faculty Board hearing and the recommendation that flows therefrom.

(2) The Army's interpretation fails to take into account the regulation as a whole since as to "harmless errors" the regulation states expressly that if the Appointing Authority notes a harmless defect in the proceedings, he may take his final action not withstanding the defect. The paragraph addressing substantial errors does not state that the Appointing Authority may make his own correction of a substantial error and take his final action notwithstanding.

(3) The Army's interpretation of its regulation requires a different reading of the word "may" depending upon whether we are considering Sub-paragraphs (1) "harmless errors," (2) "minor errors requiring correction," or (3) "substantial errors." According to the Army's interpretation, as approved by the Fifth Circuit, when the regulation in Sub-paragraphs (2) and (3) refers to "may return to a Faculty Board," they mean really "may but need not." On the other hand, when the word "may" is used in Sub-paragraph (1), it does not mean the appointing authority "may but need not" take his final action notwithstanding the defect.

(4) The Army's interpretation ironically requires that a minor error be returned to a Faculty Board for corrective action while not requiring substantial errors to be returned to a Faculty Board for corrective action. This is so because Sub-paragraph (2), dealing with minor errors, does not have the statement found in Sub-paragraph (3) dealing with substantial errors that states as to such an error, "the Appointing Authority may not use the affected part of that investigation or board as the basis for adverse action against the person whose substantial rights were prejudic-

ed." It was the inclusion of that sentence that formed the basis for the Army's contention that since the Appointing Authority could not use the affected part, that included the substantial error, he need not return the matter to a Faculty Board.

IV.

LACK OF EFFECTIVE REVIEW OF A FACULTY BOARD ACTION CONSTITUTES DENIAL OF DUE PROCESS

The Fifth Circuit's ruling creates irreconcilable conflict between Fifth and District of Columbia circuit law concerning procedural due process rights of military officers. The Circuit Court for the District of Columbia ruled in *VanderMolen* v. *Stetson,* 571 F.2d 617 (D.C. Cir. 1977) as follows:

> Without a verbatim transcript of the faculty board's proceedings, it is of course impossible to review the findings. If in fact the summary of the faculty board's findings mischaracterized VanderMolen's position, serious prejudice might have resulted. (citing cases)

Id. at 626. The Fifth Circuit's apparent distinction of *VanderMolen,* that Woodard was a reserve officer with no due process property rights, is not dispositive, since Woodard had (or at least had as a contested issue of material fact before the district court) a liberty interest protected by the due process clause of the Fifth Amendment.

Moreover, the Fifth Circuit was entirely inaccurate in asserting Woodard claimed no specific prejudice from the failure to prepare a verbatim transcript and made no claim that synopsis prepared was in any way inaccurate or imbalanced (App. at A-17). Although the pleadings in the district court and Woodard's brief to the Fifth Circuit raised the claims concerning the inadequacies of the transcript, the Fifth Circuit ignored

the claims in its opinion. Woodard's Motion for Rehearing (App. at A-45, 49-52) detailed the extensive shortcomings claimed by Woodard to exist in the synopsis transcript. Under these circumstances, the Fifth Circuit decision upholds summary jdugment against an Army officer despite unresolved claims that the synopsis transcript of the Faculty Board proceedings was imbalanced and inaccurate. This cannot be squared with *VanderMolen* v. *Stetson, supra.*

CONCLUSION

Accordingly, a writ of certiorari should issue to review the judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with the rules of the Court, true copies of the foregoing have been served on the following counsel of record by placing same in the U. S. mail, with first-class postage prepaid, on the _____ day of _____, 1982:

Major, JAGC
Office of The Judge Advocate General
Litigation Division
Department of the Army
Washington, D.C. 20310

Rex E. Lee
Department of Justice
Washington, D.C. 20530

Hal Keith Gillespie

Appendix

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-2300
Summary Calendar

Larry J. Woodard,
Plaintiff-Appellant,

vs.

John O. Marsh, Secretary of the Army,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

(SEPTEMBER 15, 1981)

Before AINSWORTH, REAVLEY and RANDALL, Circuit Judges. REAVLEY, Circuit Judge:

Larry J. Woodard brought this suit seeking reinstatement of his officer's commission in the United States Army Reserve, recall to active duty, promotion credit, payment of back wages and benefits, and correction of the Army's records. The Army filed a pre-answer "motion to dismiss or, in the alternative, for summary judgment." Without explaining its reasons, the district court granted the Army's motion "in all things," and it entered judgment for the Army. Woodard appeals. Finding a proper legal basis for the district court's judgment, we affirm.

Having received an appointment as second lieutenant in the United States Army Reserve, Woodard began a two-year term of obligated service on October 1, 1977, by attending the Military Officer Basic Course at For Huachuca, Arizona. After he failed a required examination three times, however, he was referred to a "faculty board," a panel of officers appointed to consider the cases of officers who fail to meet academic standards. The faculty board recommended that Woodard be discharged. This recommendation was approved by the "appointing authority" (*i.e.*, the Fort Commander), and Woodard was honorably discharged from the Army on July 14, 1978.

Woodard's subsequent application to the Army Board for the Correction of Military Records was unsuccessful. He has exhausted his administrative remedies.

In this suit, Woodard bases his claim for relief on three legal grounds: (1) that in discharging him, the Army failed to follow its own regulations;[1] (2) that the hearing he received violated his

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[1] Complaint Counts One, Two and Four.

In his Amended Complaint, Woodard added Count Six, in which he alleged that the decisions of the various Army tribunals were "arbitrary, capricious, unsupported by substantial evidence, and erroneous in law." This language suggests that Woodard seeks review under the Administrative Procedure Act, *see* 5 U.S.C. § 706. It is unclear whether the federal courts have jurisdiction to set aside the Army's action purely on these grounds. The APA does not provide an independent basis of jurisdiction. Califano v. Sanders, 430 U.S. 99, 107, 97 S.Ct. 980, 985 (1977). Plaintiff has cited no statutory basis for the direct review he seeks, and we have found none. We see no need to resolve the question here, however, since, as Woodard alleges in Count Four, Army regulations themselves require faculty board decisions to be supported by substantial evidence and, by implication, to be reasonable. *See* USAICS Reg. No. 600-4, ¶3-8(d). Thus, for purposes of jurisdiction, we view Count Six, like Counts One, Two and Four, as alleging that the Army failed to follow its own regulations.

right to due process of law under the Fifth Amendment; and (3) that the Army's action deprived him of the equal protection of the laws, also guaranteed by the Fifth Amendment.[2]

The Army set forth three grounds to support its Rule 12(b) motion: (1) that the district court did not have subject matter jurisdiction; (2) that, even if the court had jurisdiction, Woodard's claims were not reviewable; (3) that the complaint did not state a claim upon which relief could be granted; and (4) that the Army was entitled to summary judgment as a matter of law and undisputed fact, *see* Fed. R. Civ. P. 12(b), 56. While the district court granted the Army's motion "in all things," there is an obvious inconsistency in deciding that the court has no jurisdiction and in entering judgment, as the district court did, "on the merits." *See* Hitt v. Pasadena, 561 F.2d 606, 608 (5th Cir. 1977) (per curiam). Thus, in assessing the Army's arguments, we start at the beginning.

I. Jurisdiction

In Mindes v. Seaman, 453 F.2d 197, 198 (5th Cir. 1971), this court stated broadly that the district courts have jurisdiction over suits alleging wrongful discharge from the armed services. The court did not identify the specific statutory grant under which the district court had jurisdiction in *Mindes*. Since it is the general rule, however, that the federal courts do not have jurisdiction absent a congressional grant, *see* L. Tribe, American Constitutional Law § 3-5, we read *Mindes* as simply rejecting the theory that the courts never have jurisdiction to hear military discharge claims. We must still identify an applicable jurisdictional grant.

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[2] The due process clause of the Fifth Amendment has generally been held to make Fourteenth Amendment equal protection law applicable to the federal government. *See* Rostker v. Goldberg, ___ U.S. ___, ___ n.3, 101 S.Ct. 2646, 2650 n.3 (1981).

Woodard also attempts to rely on the Fourteenth Amendment and 42 U.S.C. § 1983. Since these are prohibitions on state action, Woodard's reliance is misplaced.

The Mandamus Act, 28 U.S.C. § 1361, gives the district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United State to perform a duty owed to the plaintiff." In Jones v. Alexander, 609 F.2d 778, 781 (5th Cir.), *cert. denied,* ____ U.S. ____, 101 S.Ct. 100 (1980), we held that this statute confers jurisdiction over a suit for injunctive and declaratory relief from a discharge allegedly made in violation of Army regulations. This holding is directly applicable to Woodard's claim that the Army failed to follow its own regulations, and it applies with equal force to his allegations of failure to perform duties imposed by the Constitution. Thus, the district court had jurisdiction over Woodard's claims for declaratory and injunctive relief.

The court also had jurisdiction over Woodard's monetary claims. The Tucker Act gives the district courts original jurisdiction of a "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department . . . ." 28 U.S.C. § 1346(a)(2). In his amended complaint, Woodard waived all claims for damages in excess of $9,999.99. Therefore, the district court had jurisdiction of his monetary claims. VanderMolen v. Statson, 571 F.2d 617, 619 n.2 (D.C. Cir. 1977).

Since we find the Mandamus Act and the Tucker Act adequate bases for jurisdiction over this suit, we decline to pass on the other grounds of jurisdiction proffered by Woodard.[3]

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[3] Woodard also relies on 28 U.S.C. §§ 1331(a), 1343(4) (1976). We note that when Woodard filed his Amended Complaint waiving all monetary claims over $9,999.99, § 1331 still required an amount in controversy exceeding $10,000. *Compare* 28 U.S.C. § 1331(a) (1976) *with* 28 U.S.C.A. § 1331 (West Supp. 1981). We also note that § 1343(4) required that the plaintiff be seeking relief under an "Act of Congress." Woodard fails to identify the Act of Congress on which we may predicate relief.

II. Reviewability

While we held in *Mindes* v. *Seaman* that the federal courts do not lack jurisdiction simply because an action challenges the personnel decisions of the military; *Mindes* makes it equally clear that a federal district court should not review every such decision, even if it has subject matter jurisdiction. *See* 453 F.2d at 199-202.

It is now well established that, despite *Mindes'* doctrine of "nonreviewability," claims that the Army failed to follow its own regulations or failed to afford procedural due process are reviewable. *See, e.g.*, White v. Callaway, 501 F.2d 672, 674 (5th Cir. 1974) (failure to follow own regulations); Sims v. Fox, 505 F.2d 857 (5th Cir. 1974) (en banc) (by implication) (procedural due process), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415 (1975). However, Woodard has cited no case, and we have found no Fifth Circuit case, which expressly considers either a claim of denial of equal protection in an Army personnel decision or the applicability of *Mindes* to such a claim. Therefore, we must decide whether the *Mindes'* doctrine of nonreviewability precludes Woodard's equal protection claim.

In *Mindes*, we identified the policy considerations underlying the doctrine of nonreviewability: "an unwillingness to second-guess judgments requiriing military expertise"; "a reluctance to substitute court orders for discretionary military decision"; and "the proper concern that such review might stultify the military in the performance of its vital mission." 453 F.2d at 199. In determining whether a court should decline review in light of these policy considerations, we said there were four factors the court should consider:

> 1. The nature and strength of the plaintiff's challenge to the military determination . . . . An obviously tenuous claim of any sort must be weighted in favor of declining review. . . .

2. The potential injury to the plaintiff if review is refused.

3. The type and degree of anticipated interference with the military function. . . .

4. The extent to which the exercise of military expertise or discretion is involved. Courts should defer to the superior knowledge and experience of professionals in matters *such as promotions* . . . .

453 F.2d at 201-02 (emphasis added) (citation omitted).

We look first to the "nature" of Woodard's equal protection claim. Woodard alleges that, although there were three others who failed the same tests he did, two of these individuals were nevertheless retained as officers.[4] Thus, Woodard's equal protection claim is that there was no rational basis for distinguishing between him and these other officers. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517 (1976) (per curiam) (distinctions among those permitted to continue livelihood as vendor need only "be rationally related to a legitimate state interest"); Kotch v. Board of River Port Pilot Commissioners, 303 U.S. 552, 556, 67 S.Ct. 910, 912 (1947)

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[4] The third, like Woodard, was discharged. It is not clear from Woodard's pleadings or from the record whether both of the retained officers failed *all* the tests he failed. His complaint ambiguously alleges that they "failed the same academic test(s)." For purposes of decision, however, we will assume that they failed the same tests the same number of times Woodard failed them.

Woodard's complaint also alleges that, since his discharge, passing standards have been lowered and students have been "passed" without successfully completing the same course Woodard failed. We think it frivolous for Woodard to argue that this allegation states the basis for an equal protection claim. The equal protection clause does not prevent the military or any other branch of government from changing its rules or standards, and it does not require the government to retroactively reassess cases properly disposed of under the old set of rules. Woodard cites no authority for his proposition, and we reject it.

(upholding, under similar standard, an apprenticeship system which left incumbents with unfettered discretion to select relatives and friends).

As for the "strength" of his claim, we note that Woodard does not dispute that his failure to pass the test was an adequate basis for his discharge. Nor does he contend that the Army was required to discharge all trainees who failed the test he failed. To the contrary, he cites and relies on the Army regulation giving the faculty board and the appointing authority several discretionary options when they decide to relieve a student for academic reasons: "reassignment, administrative hold, return to parent unit, recycle to another class within the same course of instruction, or relief from active duty or active duty training." USAICS Reg. No. 600-4, ¶1-3(a). Obviously, if test failure were the only criterion to consider, there would be no need for a faculty board hearing and no basis for the board to recommend one option over another. Instead, the regulations provide that the faculty board "will consider and include in its findings all circumstances surrounding the failure, and the attitude, application and leadership potentialities of the officer." Army Reg. No. 635-100, ¶3-22(a)(2). The purpose of the faculty board hearing is to allow the student to bring favorable evidence before the faculty board in order to allow the board to make a reasoned recommendation concerning his future as an officer. *See, e.g., id.;* USAICS Reg. No. 600-4, ¶3-6 (right to present character witnesses); *Id.* ¶3-7(a) (right to "present any facts, evidence, or extenuating circumstances to the board"). Thus, the academic relief decision is a highly discretionary one, requiring the application of "military expertise" to a wide variety of individual and inherently subjective factors in each case. *See Mindes,* 453 F.2d at 198. From such factors, the military decisionmakers are required to assess such intangibles as "leadership," "motivation," and "attitude." Army Reg. No. 635-100, ¶3-22(a)(3); USAICS Reg. 600-4, ¶1-3(c)(2) (4). In this case, Woodard would have the court determine whether there was

any rational basis for the distinctions made, on the basis of such factors, between himself and the two students who were retained. We think that this is precisely the role that *Mindes* cautions the courts from taking.

The answer to this analysis is, of course, that since the Army may take such various factors into consideration, it should not be difficult for the Army to prove some rational basis for its decision. But the central question posed by *Mindes* is whether the Army *should* be required to satisfy a federal court on this score. This question is the concern behind the third factor in the *Mindes* test, "the type and degree of anticipated interference with the military function." 453 F.2d at 201. Woodard's claim would require the Army to submit to discovery concerning its many academic relief decisions and would require all the officers involved in Woodard's case to explain for the court their reasons for distinguishing between Woodard and the other two students. While we recognized in *Mindes* that "there will always be some interference when review is granted," and while we recognize now that the *degree* of interference in this case might not be significantly greater than in other cases where we have accepted review, it is the "type . . . of anticipated interference" which we believe may "be such as to seriously impede the military in the performance of its vital duties." 453 F.2d at 201. The possibility that a federal court may later require officers to explain the "rational basis" for distinguishing one trainee from another may deter military officers from relying on inherently subjective, though proper, criteria in favor of solely "objective" criteria that make it easier to demonstrate a "rational basis" when they get to court. The result could be the loss of good officers who fail tests and the promotion of officers who can pass tests but lack the ability to exercise command.

In Johnson v. Reed, 609 F.2d 784 (5th Cir. 1980), this court upheld a district court's decision to review the pass over and discharge of an Air Force officer on the grounds that the Air

Force acted "arbitrarily and capriciously." The arbitrary action alleged in *Johnson*, however, was not the discharge decision itself but the consideraton of patently incorrect records in making the decision. *Id.* at 787. The court noted that Johnson's case was "not one in which an officer is asking a court to interfere with the discretionary rating given the officer's performance." *Id.* at 789. Woodard's case is.

Our holding is a narrow one. We make no attempt to establish a general rule for equal protection claims quesstioning the rationality of military decisions.[5] As we noted in *Mindes*, "[c]onstitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal . . . ." 453 F.2d at 201. Each claim must be considered in light of the *Mindes* factors. We hold that Woodard's equal protection claim, alleging merely that there was no rational distinction between his case and those of other officers, is not reviewable.[6] Therefore, that claim was properly dismissed by the district court.

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[5] We note that Woodard makes no claim that he was discriminated against because of his race, religion, sex, or any other such classification. Nor does he claim he was discharged for his exercise of a fundamental right. We of course express no view on the reviewability of such equal protection claims.

[6] To the extent that Count Six of Woodard's Amended Complaint — alleging that the Army's decision was "arbitrary, capricious" and "erroneous in law," *see* note 1 *supra* — may hve also relied on the differing treatment given these officers, we hold that it is nonreviewable as well.

III. The Merits[7]

A. Failure to Follow Army Regulations

Woodard alleges that the Army failed to follow its own regulations in three respects: (1) the faculty board and appointing officer considered irrelevant information in making their

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[7] Woodard makes several complaints about the evidence before the district court on summary judgment. First, he contends that the exhibits submitted by the Army were not certified as required by Fed. R. Civ. P. 56(e). The Army's motion, on the other hand, purports to be accompanied by certified copies of these exhibits, and the Army now makes the vague contention that certified copies were in fact "available to the district court." Brief for Appellee at 2 n.4. We see no need to resolve these conflicting claims, however, because there was absolutely no prejudice to Woodard if the certification requirement was not met. The Army's submissions consisted of its published regulations and the administrative record in Woodard's case. The regulations are not in any sense "facts" which are in dispute; they are the very law which Woodard relies on (and quotes extensively from) in alleging that the Army has failed to follow its own regulations. Woodard argues in effect that we must accept his interpretation of these regulations because the Army failed to certify its copies of them. These regulations are law, which this court can find for itself. As for the administrative record, Woodard does not in any way challenge its correctness or completeness. More importantly, the parts of the record on which we rely reflect facts that Woodard has conceded in his own complaint. While we do not take the requirements of Rule 56(e) lightly, neither do we interpret them to frustrate the "just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Woodard had full notice that the Army was asking the district court to convert the Rule 12(b)(6) motion into a motion for summary judgment, and he has no basis to claim prejudice from the court's consideration of the uncertified administrative record.

Woodard also complains that the Army filed late responses to two sets of interrogatories and that, therefore, "the matters of which an admission [wa]s requested [must] be deemed admitted." Fed. R. Civ. P. 36. The trial court had ample discretion to relieve the Army of its apparent default. *See* French v. United States, 416 F.2d 1149, 1152 (9th Cir. 1969); *cf.* Hartley & Parker, Inc. v. Florida Beverage Corp., 348 F.2d 161, 163 (5th Cir. 1965) (late verification). The untimeliness here was a day in one instance, and a few days in the other.

decisions; (2) the appointing officer, after disapproving four of the faculty board's sixteen findings, violated regulations by failing to send the case back to the board or to a new board for reconsideration; and (3) the decision to discharge Woodard was not based on substantial eviddnce. We consider these allegations in turn.

According to USAICS No. Reg. 600-4, ¶1-3(c),

> An academic relief occurs as a result of:
>
> (1) Failure to satisfy academic graduation criteria.
>
> (2) Leadership deficiencies.
>
> (3) Course related misconduct (e.g. cheating).
>
> (4) Motivation/attitude - deliberate lack of interest and application on the part of the student.

When an officer is referred to a faculty board for an academic relief, Army regulations direct the board to "consider and include in its findings all circumstances surrounding the failure, and the attitude, application and leadership potentialities of the officer." Army Reg. No. 635-100, ¶3-22(a)(2). In deciding whether to approve or disapprove the faculty board's recommendation, the appointing authority "may consider *any* relevant information in making a decision." Army Reg. No. 15-6, ¶2-3(a) (emphasis added).

Woodard argues that, under these regulations, six of the faculty board's sixteen findings were irrelevant.[8] In its brief, the

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[8] The six challenged findings read as follows:

> 7. That 2LT Woodard was inducted into the US Army in January 1971 and was subsequently released approximately four months later in May 1971 for medical reasons;
>
> 8. That according to 2LT Woodard's testimony the medical problem was administratively reviewed in 1973 by the Department of the Army board. The review resulted in the decision that 2LT Woodard was medically fit for active duty;

Army concedes that four of the six were irrelevant, but it points out that these four were rejected by the appointing authority as unsupported by substantial evidence, so that they played no part in the appointing authority's decision to approve the recommendation.[9] The Army argues that the other two findings

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9. That, in October 1973, 2LT Woodard enlisted in the US Army under a combat arms option. In March 1974, 2LT Woodard initiated action to be released from active duty due to nonfulfillment of his combat arms option contract by the US Army;

10. That a review of testimony and subsequent questioning of 2LT Woodard by members of the board revealed numerous inconsistencies, apparent contradictions and often vague responses. These characteristics displayed by 2LT Woodard causes [*six*] doubt as to his ability to accurately report facts;

11. That testimony and records submitted as evidence indicated that in 1976 2LT Woodard, a then 25 year old individual with previous military experience coupled with experience in criminal law, was not factual in completing required military medical forms;

15. That 2LT Woodard's behavior before a board of field grade officers was characterized by several uses of profane and crude language. The use of such language indicates a lack of common sense and good judgment since 2LT Woodard's legal counsel based a large portion of his case on the use of profane language by the DOT Faculty in formal faculty/student situations[.]

[9] The Army's concession is ambiguous. It concedes only that findings 7-10, *see* note 8 *supra*, "were irrelevant to Woodard's academic deficiencies." Brief for Appellee at 40-41. It is unclear whether the Army would still contend that findings 7-10 were relevant to "leadership deficiencies" as a ground for academic relief. Moreover, elsewhere in its brief it contends that all the information considered and findings made by the faculty board were relevant. *See, e.g., id.* at 40 n.9. When the passage at pages 40-41 of its brief is read in its entirety, the Army seems to be stating that findings 7-10 were disapproved because they were irrelevant. This is incorrect; the findings were disapproved for lack of substantial evidence. Thus, it may be that the Army's concession was inadvertent. For present purposes, however, we will assume that the findings were irrelevant.

were relevant, and that the twelve relevant findings were amply sufficient to support the appointing authority's decision.

We agree with the Army's argument. The two findings at issue relate to Woodard's "nonfactual" statement, made when he was applying for his commission, that he had never previously been discharged from military service, and to his use of "profane and crude" language before the faculty board itself. We think that both of the findings were relevant to the issue of "leadership deficiencies," because, as the faculty board expressly stated with regard to the second finding, the actions could "indicate[] a lack of good judgment and common sense." Woodard does not dispute either finding, and both appear indisputable from the evidence in the record. Moreover, the other relevant findings before the appointing authority stated that Woodard had failed to meet academic requirements and that his superior officers did not believe he had "the ability or potential to be an officer in the US Army." Woodard raises no serious contention that the twelve relevant findings were insufficient to justify the appointing authority's action.

Woodard nevertheless contends that, had the faculty board not considered the four irrelevant findings, it might not have recommended discharge. The appointing authority, however, is not bound by the recommendation of the faculty board. Army Reg. No. 15-6, ¶2-3(a); USAICS Reg. No. 600-4, ¶3-10(a). Thus, it is of no consequence whether the faculty board would have given a different recommendation had it not made the four irrelevant findings. It is empty to assert that the appointing authority, who himself disapproved the four findings at issue, did not give due regard to the fact that the faculty board's recommendation was based in part on these findings.

Woodard replies in his second argument, however, that the regulations in any case required the appointing authority to send his case back to the same or to another faculty board. Woodard rests this argument on the regulation concerning the appointing authority's disapproval of board findings:

c. **Effect of errors.** . . .

(1) *Harmless errors.* If the appointing authority notes a harmless defect in the proceeding he may take his final action notwithstanding the defect.

(2) *Minor errors requiring correction.* If the investigating officer or board has failed to make a finding or recommendation required by the letter of appointment or a specific directive, or if there has been a minor procedural error or omission which may be corrected without prejudice to a respondent, the appointing authority *may* return the case to the same investigating officer or board for corrective action.

(3) *Substantial errors.* In case of a jurisdictional error (e.g., failure to meet essential requirements with regard to appointment or composition) or an error which has a material adverse effect on an individual's substantial rights, the appointing authority may not use the affected part of that investigation or board as the basis for adverse action against the person whose substantial rights were prejudiced. . . . If the error can be corrected without prejudice to a respondent, the appointing authority may do so, returning the case to the same investigating officer or board for corrective action, *if necessary*. In case of an error which cannot be corrected otherwise, the appointing authority *may* set aside the findings and recommendations and refer the case to a new investigating officer or board composed entirely of new voting members.

Army Reg. No. 15-6, ¶2-3(c) (emphasis added). Even if we assume *arguendo* that the four findings were "substantial errors" as that term is defined in the regulation, its provisions are permissive: they simply do not require the appointing authority to send a case back to a faculty board. The regulation requires

only that the appointing authority "not use the affected part . . . as the basis for adverse action." The Army argues that, when the appointing authority disapproves erroneous findings but concludes that the remaining findings support his decision, he may exercise his usual power to make whatever disposition of the case he deems appropriate, *see* Army Reg. No. 15-6, ¶2-3(a); USAICS Reg. No. 600-4, ¶3-10(b), without sending the case back to a faculty board. We cannot say that the Army's interpretation of its regulations is arbitrary or capricious, *see* Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801 (1965); Hodes v. Callaway, 499 F.2d 417, 422 (5th Cir. 1974); we think it more consistent with the language of the regulations than Woodard's interpretation.

Finally, we consider Woodard's allegation that the Army's decision was not supported by substantial evidence. Army regulations permit the discharge of any officer who fails his officer basic course. Army Reg. No. 635-100, ¶3-20. It is undisputed that Woodard failed a required examination not once, but three times.

Thus, we conclude that there is no genuine issue of material fact concerning Woodard's claim that the Army failed to follow its own regulations. The district court properly granted summary judgment on this claim.

B. The Procedural Due Process Claim

Woodard claims that he was denied procedural due process because Army regulations do not require a verbatim transcript of faculty board proceedings. The regulations require only that a synopsis be prepared. USAICS Reg. 600-4, ¶3-7(b)(8).

In Sims v. Fox, 505 F.2d 857 (5th Cir. 1974) (en banc), *cert. denied,* 421 U.S. 1011, 95 S.Ct. 2415 (1975), we held that the Air Force could honorably discharge a reserve officer without a due process hearing. Because 10 U.S.C. § 1162(a) provides that

"reserve commissioned officers may be discharged at the pleasure of the President," we held that a reserve officer has no reasonable expectation of continued employment and thus no property interest protected by the due process clause. *Id.* at 861-62. We also held that Sims had no liberty interest in his reputation because his discharge was honorable and Air Force regulations required that the reasons for his discharge be kept confidential. *Id.* at 862-64.

Inexplicably, Woodard has neither cited *Sims* in his brief nor responded to the Army's reliance on *Sims* in his reply brief. The reason must be that there is no response. Woodard's commission is also subject to the terms of 10 U.S.C. § 1162(a); the Army is prohibited by statute from revealing the reasons for Woodard's discharge to outside persons. 5 U.S.C. § 552a(b); *see id.* § 552(b)(6).[10] Therefore, *Sims* controls this case.

In light of *Sims*, it is apparent that the Army has been more than fair in affording procedural protections to Woodard. On a charge of academic deficiencies, the Army gave Woodard notice, an adversary-type hearing, appointed counsel, and the opportunity to question all witnesses, respond to any evidence against him, and present evidence, character witnesses, and extenuating circumstances. *Cf.* Sims v. Fox, 492 F.2d 1088, 1094 (5th Cir.) (requiring only that officer discharged for *disciplinary* reasons be allowed to present his own case, and expressly declining to require right to counsel), *vacated en banc,* 505 F.2d 857 (5th Cir. 1974), *cert. denied,* 421 U.S. 1011, 95 S.Ct. 2415

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[10] Woodard apparently concedes that the Army will not release the reasons for his discharge, but he nevertheless contends that he has a liberty interest in his reputation because he will be hard-pressed to explain to prospective employers why he served only eight months of a two-year commitment. *See* Appellant's Reply Brief at 8-9. While we appreciate Woodard's difficulty, we do not think that Woodard's need to give personal explanations of his academic discharge is a greater infringement on liberty that Sims' need to give explanations of his discharge for indecent exposure. *See Sims,* 505 F.2d at 864 (no infringement of liberty unless *government* perpetuates untrue charges).

(1975). *See also* Board of Curators v. Horowitz, 435 U.S. 78, 98 S.Ct. 948 (1978) (when the state dismisses a student from medical school for *academic* reasons, it need not grant an adversary-type hearing). Woodard does not claim any specific prejudice from the failure to prepare a verbatim transcript; he does not claim that the synopsis prepared was in any way inaccurate or imbalanced. In sum, Woodard makes no serious contention that the procedures adopted by the Army were in any way unfair. *See generally* Ka Fung Chan v. Immigration & Naturalization Service, 634 F.2d 248, 258 (5th Cir. 1981) ("proof of a denial of due process in an administrative proceeding requires a showing of substantial prejudice").

Thus, Woodard has failed to state a claim of denial of procedural due process. The district court correctly dismissed this claim on the merits.

The judgment of the district court if AFFIRMED.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Civil Action No. S-79-82-CA

Larry J. Woodard

vs.

Clifford Alexander, Jr.,
Secretary of the Army

ORDER

On this day came on to be considered Defendant's Motion to Dismiss or, in the Alternative for Summary Judgment and Defendant's Motion to Dismiss Plaintiff's First Amended Complaint; and the Court having considered the same is of the opinion that said Motions to Dismiss and for Summary Judgment should be in all things GRANTED.

It is so ORDERED.

Signed this 14th day of November, 1980.

William M. Steger
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Civil Action No. S-79-82-CA

Larry J. Woodard

vs.

Clifford Alexander, Jr.
Secretary of the Army

JUDGMENT

This action came on for consideration before the Court, Honorable William M. Steger, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is ORDERED and ADJUDGED that the Plaintiff take nothing, that the action be dismissed on the merits, and that Defendant recover of the Plaintiff its costs of action.

Signed this 14th day of November, 1980.

William M. Steger
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-2300

Larry J. Woodard,
Plaintiff-Appellant,

vs.

John O. Marsh, Secretary
of the Army,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas

ON PETITION FOR REHEARING

(Filed October 27, 1981)

Before AINSWORTH, REAVLEY and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Thomas M. Rearley
United States Circuit Judge

APPENDIX I
AR 15-6

2-3. Action of the appointing authority *a. Basis of decision.* Unless otherwise provided by another directive, the appointing authority is not bound by the findings or recommendations of an investigation or board. He may consider any relevant information in making a decision, even though that information was not considered at the investigation or board. If additional information is to be considered, however, any respondent who may be affected adversely by that information will be so advised in writing; he will be given an opportunity to reply in writing and to submit relevant material; and his reply will be considered along with the additional information.

b. Legal review. Other directives which authorize investigations or boards may require the appointing authority to refer the report of proceedings to the servicing judge advocate for legal review, and the appointing authority should do so in other cases involving serious or complex matters. The judge advocate's review will determine whether legal requirements have been complied with, the effect of any error (including whether any error has a material adverse effect on any individual's substantial rights), whether the findings of the investigation or board, or those substituted or added by the appointing authority, are supported by substantial evidence or lack of it (see para 3-1*0b*), and whether the recommendations are supported by the findings.

c. Effect of errors. Procedural errors or irregularities in an investigation or board normally do not invalidate the proceeding or any action of the appointing authority based on it.

(1) *Harmless errors.* If the appointing authority notes a harmless defect in the proceeding he may take his final action notwithstanding the defect.

(2) *Minor errors requiring correction.* If the investigating officer or board has failed to make a finding or recommendation

required by the letter of appointment or a specific directive, or if there has been a minor procedural error or omission which may be corrected without prejudice to a respondent, the appointing authority may return the case to the same investigating officer or board for corrective action.

(3) *Substantial errors.* In case of a jurisdictional error (e.g., failure to meet essential requirements with regard to appointment or composition) or an error which has a material adverse effect on an individual's substantial rights, the appointing authority may not use the affected part of that investigation or board as the basis for adverse action against the person whose substantial rights were prejudiced. (Use of *evidence* considered by the investigation or board is not precluded in connection with action under the Uniform Code of Military Justice, civilian personnel regulations, AR 600-37, or any other directive which contains its own procedural safeguards.) If the error can be corrected without prejudice to a respondent, the appointing authority may do so, returning the case to the same investigating officer or board for corrective action, if necessary. In case of an error which cannot be corrected otherwise, the appointing authority may set aside the findings and recommendations and refer the case to a new investigating officer or board composed entirely of new voting members. The new investigating officer or board may be furnished any evidence properly considered by the previous investigating officer or board. Additional evidence also may be considered by the new investigating officer or board. If the specific directive under which a board is appointed provides that the appointing authority may not take less favorable action with regard to a respondent than the board recommends, the appointing authority's action is limited by the original recommendations even though the case subsequently is referred to a new board which recommends less favorable action.

* * *

3-7. Rules of evidence. *a. General.* Proceedings utilizing this regulation are administrative and not judicial in nature; therefore, an investigating officer or board of officers is not bound by the rules of evidence prescribed for trials by courts-martial or for court proceedings generally. Accordingly, subject only to the provisions of *c*, below, anything which in the minds of reasonable persons is relevant and material to an issue may be accepted as evidence. All evidence will be given such weight as is warranted under the circumstances. (See para 3-4 as to who decides whether offered evidence will be accepted.)

* * *

3-8. Witnesses. *c. Taking testimony or statements.* If a board is formal, or if the appointing authority has directed a verbatim record (see para 2-2), witnesses' statements should be elicited by questions and answers. In all other cases, statements of witnesses may be obtained at informal sessions in which the witness relates his knowledge and it is then summarized on DA Form 2823 (statement). A tape recorder may be used at such sessions to facilitate later preparation of written statements, but the witness should be informed if one is to be used. The investigating officer or board should assist the witness in preparing a written statement to avoid inclusion of irrelevant material or the omission of important facts and circumstances which are within the knowledge of the witness. However, care must be taken to ensure that the statement is phrased in the words of the witness. The interviewer must scrupulously avoid coaching the witness or suggesting the existence or non-existence of material facts. The witness may be asked to read the final statement, make appropriate corrections, and sign it. If the witness is unavailable or refuses to sign, the person who took the statement will note, over his own signature, the reasons the witness has not signed the statment and certify that the statement is an accurate summary of what the witness said. Whether the proceeding is formal or informal, to conserve time and resources, a witness may be asked to confirm a prior written statement

(which will first be made an exhibit), but he is subject to questioning on the substance of such statement.

* * *

Section II. FINDINGS AND RECOMMENDATIONS

3-10. Findings. *a. General.* A finding is a clear and concise statement of a fact directly established by evidence in the record, or is a conclusion of fact by the investigating officer of board which can be readily deduced from evidence in the record. Negative findings (e.g., that the evidence does not establish a fact) are permissible and often appropriate. The number and nature of the findings required depend on the purpose of the investigation or board and on the instructions of the appointing authority. The investigating officer or board should not exceed the scope of findings indicated by the appointing authority (see para 3-9). The findings should relate to and must be sufficient to support each recommendation made.

b. Standard of proof. Unless another directive or an instruction of the appointing authority establishes a different standard, the findings of investigations and boards governed by this regulation must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion. The evidence must establish a degree of certainty upon which a reasonable person is convinced of the truth or falseness of a fact, taking into consideration all the facts presented and all reasonable inferences, deductions, and conclusions drawn from them, and considering these elements in their entirety and in relation to each other. The weight of the evidence is not determined by the number of witnesses or volume of exhibits, but by considering all the evidence, evaluating such factors as the witness' demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, and other indications of veracity.

* * *

3-11. Recommendations. The nature and extent of recommendations required also depend on the purpose of the investigation or board and on the instructions of the appointing authority. Each recommendation, even a negative one (e.g., that no further action be taken), must be supported by th e findings. Investigating officers and boards should make their recommendations according to their understanding of the rules, regulations, policies, and customs of the service, guided by their concept of justice both to the Government and to individuals.

3-12. Deliberation. After all the evidence has been received (and arguments heard, if there is a respondent), the investigating officer or board members should consider it carefully and in light of the instructions contained in the original appointment and any supplemental instructions. These deliberations should (and if there is a respondent, must) be in closed session, that is, with only voting members present. Nonvoting members of the board do not participate in the board's deliberations but may be consulted as desired. If there is a respondent, he and his counsel, if any, should be present during such consultation. At the board's request, the legal advisor, if any, may assist in putting the findings and recommendations in proper form after their substance has been adopted by the board. A respondent or counsel is not entitled to be present during such assistance.

3-13. Voting. A board composed of more than one officer arrives at its findings and recommendations by voting. All voting members present must vote. After thoroughly considering and discussing all the evidence, the board should propose and vote on findings of fact. The board should next propose and vote on recommendations. If it becomes apparent that additional findings are necessary to support a proposed recommendation, the board should vote on such findings before voting on the related recommended. In all cases, a majority vote of the voting members present determines questions before the board. In case

of a tie vote, the proposal for which the president voted is the determination of the board. If any member does not agree with the findings or recommendations of the board, he may include a minority report in the report of proceedings (DA Form 1574), stating explicitly what part of the majority report he disagrees with and his reasons. The minority report may include its own findings or recommendations.

APPENDIX F

AR 635-100

Section II. Relief From Active Duty And Termination Of Reserve Commissions Of Student Officers Attending Branch Orientation Or Familiarization Courses

3-20. General. Officers of the Army National Guard of the United States and the United States Army Reserve having less than 3 years commissioned service who fail to meet standards of service shcools while attending Branch Orientation or Familiarization courses of their basic or detailed branch due to disciplinary reasons or academic or leadership deficiencies may be relieved from active duty or active duty for training and may be discharged from their Reserve commissions. This includes officers whose basic branch is Military Intelligence who are detailed in other branches for strength accounting only and who are attending courses of instruction at The Infantry School as part of their basic course.

3-21. Authority. *a.* Officers exercising general court-martial jurisdiction over individual service schools and The Judge Advocate General for JAGC officer students attending The Judge Advocate General's School are delegated final authority to approve or disapprove recommendations for relief from active duty and discharge under this section. This authority will not be further delegated.

b. The appropriate general court-martial authority will—

(1) Approve or disapprove the findings and recommendations of the faculty board.

(2) If release from active duty and discharge, or other action within authority of the school commandant, is directed, return the proceedings to the school commandant for action.

* * *

APPENDIX G

USAICS Reg 600-4*

DEPARTMENT OF THE ARMY
HEADQUARTERS, US ARMY INTELLIGENCE CENTER
AND SCHOOL
Fort Huachuca, Arizona 85613

USAICS Regulation
No. 600-4

September 20, 1977

Personnel General

RELIEF FROM RESIDENT COURSE OF INSTRUCTION AND FACULTY BOARDS

Supplementation of this Regulation is not permitted. USAISD will establish a separate regulation as outlined in para 1-2f.

Section I

GENERAL

* * *

1-1 PURPOSE. This regulation prescribes policies, responsibilities, and procedures for the relief of students from a resident course of instruction and the conduct of faculty boards at USAICS Ft Huachuca.

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* This regulation rescinds USAICS Reg 600-1, 7 Jul 77, and rescinds USAICS Reg 351-16.

1-2 POLICIES.

A. The Commandant may relieve students for academic and administrative reasons as defined in para 1-3 below. (The Commandant may not relieve students solely for failure to meet specific course prerequisites if those specific prerequisites have been waived by DA.)

b. Approval/disapproval authority for requests for academic relief of students is delegated to the Director of Training (DOT).

c. Approval/disapproval authority for the administrative relief of students is delegated to the Commander, School Brigade.

d. A student who is being considered for academic relief will have that action completed prior to consideration of any other relief action.

e. The DOT may waive portions of graduation criteria to allow additional retraining and retesting of a student.

(1) Such a waiver may not, however, permit a student to graduate without first having achieved minimum entry level standards set forth in the graduation criteria, place a student in a different class, or cause a student in a self-paced course to exceed the maximum time limits established in the graduation criteria for completion of the course of instruction.

(2) Approval of such retesting eliminates the requirement for relief from the course of instruction.

(3) Results of additional retesting will be forwarded to the Academic Records Division for inclusion in the student's academic file.

f. USAISD will establish a separate regulation covering relief actions and faculty boards at USAISD. The Deputy Comman-

dant USAISD is authorized to act for the Commandant in all proceedings. Delegation of responsibilities similar to those outlined herein is authorized and encouraged. Basic due-process requirements outlined herein must be included. Copies of the USAISD regulation published to satisfy this requirement must be forwarded to USAICS, ATTN: ATSI-TP-AD.

1-3 DEFINITIONS.

A. Relief is defined as removal from current course of enrollment followed by: reassignment, administrative hold, return to parent unit, recycle to another class within the same course of instruction, reassignment to another course of instruction, or relief from active duty or active duty training.

b. An administrative relief occurs as the result of:

(1) Physical disability.

(2) Hospitalization.

(3) Disciplinary problems (non-course related).

(4) Compassionate reason(s).

(5) Recall by parent unit.

(6) Erroneous enrollment.

(7) Security clearance denial/withdrawal.

(8) Other, administrative actions for which separate Army Regulations establish a specific procedure for processing; such as, moral objection, resignation, death, separation, AWOL, desertion or other reasons not stated above and not related to achievement of course objectives.

c. An academic relief occurs as a result of:

(1) Failure to satisfy academic graduation criteria.

(2) Leadership deficiencies.

(3) Course related misconduct (eg: cheating).

(4) Motivation/attitude - deliberate lack of interest and application on the part of the student.

d. A faculty board is defined as a board, consisting of service members senior to the student, tasked by the Commandant to consider the circumstances that prompted the request for academic relief, and make a recommendation to the Commandant concerning the student's disposition.

Section II

RELIEF FROM RESIDENT COURSES OF INSTRUCTION

* * *

2-2 RESPONSIBILITIES.

A. The DOT will:

(1) Insure that the provisions of this regulation as pertains to academic relief is explained to all students during the formal introduction of the course.

(2) Review academic relief actions for disposition.

(3) Forward approved student academic relief actions to the Academic Records Division.

(4) Request that a faculty board be convened to consider the cases of students who have so requested UP of para 2-1a.

(5) Insure that students on whom an academic relief action is pending continue to receive instruction until final disposition of the relief action. Students retained in a course of instruction pending resolution of an academic relief action will not be

graduated until final disposition of that relief action. Such students, having completed all remaining elements of the course of instruction prior to disposition of the relief action will be remanded to the School Brigade until final disposition. Exceptions to the requirement for continuing a student's instruction pending disposition of his/her academic relief action are:

(a) In the case of self-paced courses, the DOT may defer further instruction of a student pending disposition of a relief action on that student.

(b) In the case where a student on whom a relief action is pending constitutes, in the judgement of the DOT or the concerned department director, a disciplinary problem or a disruptive influence in his/her class, the DOT may remove the student from class and remand him/her to the School Brigade pending disposition of that student's relief action.

(c) Students enrolled in Intelligence Officer Basic Core Curriculum (i.e., Phase I of MI Officer Basic Courses), on whom an academic relief action is pending, shall not be allowed to enter Phase II of the course (i.e., the track of MOS-producing phase) until resolution of the relief action. Such students will be remanded to the School Brigade if their relief action is pending at the conclusion of Phase I.

b. The Commander, School Brigade, will:

(1) Insure that the provision of this regulation as pertains to administrative relief is explained to all students during initial briefing.

(2) Review administrative relief actions for disposition.

(3) Forward approved action to ARD.

(4) Assist students in resolving all administrative problems interfering with the successful completion of training.

c. Academic Records Division will, upon receipt of an approved academic or administrative relief action, take appropriate action, in accordance with paragraph 3-11, Section III, of this regulation.

• • •

Section III

FACULTY BOARDS

• • •

3-7 PROCEDURES AND MILESTONES

• • •

b. Board procedures:

(1) The recorder will state specific reasons why the case is before the board and will have the academic and military personnel records of the student available for review.

(2) The senior member will be the president. The president will conduct the board IAW AR 15-6 and this regulation to produce the necessary facts to assist the members in arriving at fair and logical findings and recommendations.

(3) Board members may question any individual appearing before the board on any matter pertinent to the case.

(4) The respondent will be given the opportunity to present any facts, evidence, or extenuating circumstances to the board, and to question all witnesses.

(5) Persons testifying before the board will be sworn by the recorder.

(6) As faculty board proceedings are administrative and not judicial in nature, the board is not bound by the rules of

evidence prescribed for trials by courts-martial. Any oral or written matter (including hearsay), which in the minds of reasonable persons is relevant and material, is admissible.

(7) Board members are not subject to peremptory challenge. The respondent may challenge members for cause where it appears clear that a challenged member cannot impartially participate in the proceedings. Action will be taken on the challenge by the appointing authority or president, as appropriate.

(8) Faculty board proceedings will be conducted with sworn testimony, and a synopsis will be prepared for the written report of proceedings.

(9) The board will develop findings, make recommendations and forward a Report of Proceedings IAW paragraphs 8 and 9, Section III of this regulation.

3-8 FINDINGS AND RECOMMENDATIONS.

a. Students appearing before the board will be informed of the board's findings and recommendations and given the opportunity to add any final statement prior to the Report of Proceedings being given to the Commandant (see Figure 4). The student will be notified of the final decision by the recorder through his/her company within 24 hours after final action is taken by the Commandant.

b. Faculty board deliberations prior to voting will be held in closed session. A majority vote approves a recommendation.

c. The board will make one of the following recommendations:

(1) That the student stay in his/her present class and receive a diploma upon completion of the course.

(2) That the student be recycled to another class within the same course of instruction.

(3) That the student be enrolled in a course more suitable to his/her capabilities.

(4) That the student be relieved from class and action taken to reassign him/her (not applicable in cases involving student officers previously awarded a MOS)

(5) IAW Section II, AR 635-100, that regular Military Intelligence Officer Basic Course (MIOBC) students, with less than three years of commissioned service (active or inactive), who are before the board for disciplinary reasons, academic, or leadership deficiencies may be relieved from active duty or active duty for training and be discharged from their reserve commissions.

(6) Any combination of the above that can be supported by the findings.

d. Findings and recommendations must be supported by substantial evidence, which is defined as such evidence presented during the open session of the board proceedings as a reasonable mind can accept as adequate to support the conclusion.

3-9 REPORTS. Board proceedings, findings, recommendations, a synopsis of testimony (typed on bond paper), and other pertinent facts will be authenticated by the president of the board and the recorder. The completed report in two copies will be forwarded to the Commandant for approval not later than five working days following the conclusion of the board. The report will contain three sections: Letter of Transmital (see Figure 5), the Report of Proceedings (DA Form 1574, Report of Proceedings by Investigating Officer (Board of Officers) and the students final statement as provided for in para 3-8a above.

3-10 APPROVAL.

a. The Commandant will review the findings and recommendations of all faculty boards. Approval of board recommendations constitutes a final decision except in cases involving a recommendation for elimination UP AR 635-100 in which case final approval rests with the General Courts-Martial Authority (Commander, Headquarters, Fort Huachuca).

b. The approving authority is not bound by board recommendations and may direct other disposition of the case as he deems to be appropriate and administratively correct.

c. Upon approval, the entire packet will be forwarded to G1 (ATSI-TP-AD) for distribution and file. The original copy of the USAICS-TPQ Form 6 accompanying the action will be forwarded to ARD for initiation of approved disposition action on the student.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Civil Action No.
S-79-82-CA

Larry J. Woodard,
Plaintiff,

vs.

Clifford Alexander, Jr.,
Secretary of the Army,
Defendant.

RESPONSE TO DEFENDANT'S MOTION TO STAY DISCOVERY AND BRIEF IN SUPPORT OF MOTION TO COMPEL DISCOVERY

COMES NOW Plaintiff, Larry J. Woodard, and in response to the motion of Defendant, Clifford Alexander, Jr., Secretary of the Army, to stay all further discovery herein pending disposition of Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment, and in support of Plaintiff's Motion to Compel Discovery would show the Court the following:

INTRODUCTION

Plaintiff, Larry J. Woodard, seeks reinstatement of his commission in the U.S. Army Reserve, back pay (limited to $9,999.99, the jurisdictional limit for this Court), correction of records, and ancillary relief. Delay has characterized this suit to date. Plaintiff filed his complaint more than one year ago, on August 7, 1979. To date, Defendant has not filed an answer.

Defendant filed its Motion to Dismiss, or in the Alternative, for Summary Judgment on November 21, 1979. Plaintiff filed his First Amended Complaint on December 27, 1979. Five months later, on June 2, 1980, Defendant responded to the First Amended complaint with a Motion to Dismiss adopting Defendant's Motion to Dismiss or in the Alternative, for Summary Judgment, filed November 21, 1979. The pending motions have been fully briefed.

Plaintiff submits that Defendant should be compelled to provide all requested discovery and Defendant's Motion to Stay Discovery lacks merit for these reasons:

ARGUMENT

I.

The Discovery Sought is Relevant to the Subject Matter Involved in the Pending Action

Had Defendant simply filed a motion to dismiss, Defendant's argument that the discovery sought is irrelevant to the subject matter involved in the pending action would be sound. Plainly, a motion to dismiss (unless converted under Rule 12(c), F.R.C.P. into a motion for summary judgment) is a legal decision based upon matters appearing in the pleadings (the First Amended Complaint).[1]

Fatal to Defendant's Motion to Stay Discovery, however, is the equally irrefutable fact that Defendant has not merely moved to dismiss; Defendant has moved in the alternative for summary

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[1] Rule 12(c), F.R.C.P., provides in part:

> If, on a motion for judgment in the pleading, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .

judgment. This, of course, is a motion, as shown in our previous briefs, requiring a showing that based upon material undisputed facts, Plaintiff is not entitled to prevail. Defendant has not yet filed an answer to Plaintiff's First Amended Complaint (since the Court has not yet denied Defendant's Motion to Dismiss, thus necessitating an answer). Accordingly, discovery is obviously necessary in order to determine whether or not there *are* material facts in dispute. For example, Plaintiff alleges Defendant failed to comply with its own regulations with respect to Larry J. Woodard. To determine whether Defendant failed to comply with its own regulations, it is necessary to discover precisely what procedural steps Defendant took with respect to Plaintiff.

In short, Plaintiff's discovery is relevant to the pending subject matter—it is relevant to whether Defendant's Motion for Summary Judgment is well taken. We agree with Defendant that on the simple question of the Motion to Dismiss, discovery is not needed.[2] But Defendant made the choice in November, 1979, to file not simply a Motion to Dismiss, but to couple with it a Motion for Summary Judgment. Obviously, to determine whether there are material facts in dispute, we must discover the material facts. Plaintiff's discovery attempts no more than this.

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[2] We urge the Court to make a speedy disposition of the Motion to Dismiss and to withhold ruling on Defendant's Motion for Summary Judgment until the facts are developed. As shown in our previous briefs, by specifically amending the complaint to come within the under $10,000.00 jurisdictional limit of this Court, Plaintiff removed any arguable basis for a Motion to Dismiss. We do not ask this court to review "subjective, discretionary determinations regarding qualifications for military leadership." That language belongs to Defendant. Our complaint seeks specific relief for, among other things, failure of the military to follow its own regulations. As shown in our brief, the courts approve this as a proper judicial function.

II.

The Discovery Sought is Appropriate, Unburdensome, and Unoppressive

Plaintiff has received responses, and in some instances, objections, to sets of combined interrogatories and requests for admissions to Defendant. Additionally, depositions of Plaintiff (taken at the *request* of *Defendant,* and in no way relating to any "threshold question" raised in Defendant's Motion to Dismiss) and of Joy Riley have been taken. What remains as pending discovery, compared to the discovery already accomplished, is minimal—though important. The few remaining discovery items that have prompted Defendant's Motion to Stay Discovery are fully articulated in the letter of Plaintiff's counsel dated July 7, 1980, to Defendant's counsel. We attach this letter as Exhibit "A" hereto and incorporate it fully by reference. We submit that the Court should specifically review the matters raised in this July 7, 1980 letter since the letter not only explains the limited nature of pending discovery, but articulates the discoverability of the few items at issue.

Further, it should be noted that Defendant's effort to stay discovery is without merit since it requests a stay of "all further discovery," while arguing that the "discovery sought is irrelevant to the subject matter involved in the action." Defendant's Motion to Stay Discovery is dated August 26, 1980. Plaintiff may, indeed, seek discovery in addition to that already propounded. We submit that a blanket protective order, as sought, would be inappropriate, since all discovery should be conducted in accordance with the Federal Rules of Civil Procedure whereby objection is made, if at all, to interrogatories or requests, as they arise. Blanket protective orders are not favored by the Rules, since the moving party (Defendant herein) must show good cause of a protective order, "which puts the burden on him to show some plainly adequate reason for such an order." C. Wright, Law of Federal Courts, 321 (1963).

III.

The Unavailability of Records is no Basis for a Stay

Clearly, no party can produce what does not exist. However, a review of Plaintiff's Interrogatories and Requests for Admission (attached as Exhibits 1 and 3 to Defendant's Motion to Stay Discovery) illustrates that supplementary answers should be supplied if additional or different information becomes known to Defendant. Hence, the proper way to resolve any alleged unavailability of documents is not with the unique treatment of a protective order. Rather, it is the simple supplementation of interrogatories explaining when and if documents become unavailable. The inappropriateness of a stay of discovery is highlighted by the fact that Defendant first claimed that certain records are unavailable in August, 1980, long after Defendant filed what are, to date, incomplete answers to interrogatories and requests for admission (as set forth in Exhibit "A"). This triggers obvious questions by Plaintiff as to when and why such records were "routinely destroyed" given the pendency of this federal court suit. These are matters of discovery that should be gone into, and that are not the basis for any stay.

WHEREFORE, Larry J. Woodard respectfully prays that this Court deny Plaintiff's Motion to Stay Discovery and compel the discovery sought herein.

Respectfully submitted,

HICKS, GILLESPIE & JAMES
Suite 704E Mockingbird Towers
1341 West Mockingbird Lane
Dallas, Texas 75247
214/630-8621

By: Hal K. Gillespie

Exhibit A

HICKS, GILLESPIE & JAMES, P.C.
A Professional Corporation
Suite 704E Mockingbird Towers
1341 West Mockingbird Lane Dallas, Texas 75247
P.O. Box 47222
Dallas: 630-8621 Metro: 263-0831

July 7, 1980

Ms. Martha Clark
Assistant U. S. Attorney
U. S. Department of Justice
Eastern District of Texas
Office of the U. S. Attorney
P. O. Box 1049
Tyler, Texas 75710

Re: No. S-79-82-CA;
Larry J. Woodard vs.
Clifford Alexander, Jr.,
Secretary of the Army

Dear Ms. Clark:

In reviewing the Defendant's responses to Plaintiff's Interrogatories thus far, it occurs to me that several loose ends need to be tied up. Hopefully, we can resolve this by informal methods. Accordingly, please advise me in writing, within the next two weeks, whether you would be willing to amend your responses, without need for a motion to compel, to provide the following:

(1) Interrogatory No. 5 of the First Interrogatories requested that Defendant state "in detail the recommendations, and the ultimate result" with reference to all students who failed the

same academic test Woodard failed that resulted in recommendation for academic relief. Instruction C, accompanying Plaintiff's First Interrogatories, was:

> Whenever any of the following interrogatories elicits a response which mentions a document or which you believe is supported by a document, please identify and attach a copy of such document.

Interrogatory No. 5, coupled with Instruction C, requires identification and attachment of the Faculty Board's findings and recommendations on Sharon Harps and Joy Riley. Lest there be any doubt that these items have been requested, Interrogatory No. 35 of Plaintiff's Second Interrogatories is as follows:

> Please identify (being sure to comply with Instructions B and C above), the Faculty Board's findings and recommendations with respect to Sharon Harps and Joy Riley.

In our view, Defendant's objection to these interrogatories is not a valid basis for resisting discovery. We know the identity of the individuals in question, so a responsive answer to the interrogatory will not be an invasion of privacy. Moreover, such a concern is to be handled by a request for a protective order from the court, should you deem one to be necessary, not by failure to respond to the discovery request. We have no intention of publishing the data we obtain from these interrogatories. The information requested is reasonably calculated to lead to discovery of admissible evidence, particularly in a case involving a claim of equal protection, where comparison is an inherent part of the analytical process.

(2) Similarly, we feel we are entitled to the Summary of Proceedings of the Faculty Board in connection with 2d Lts. Sharon Harps and Joy Riley. This is called for by Interrogatory No. 37 of Defendant's Second Interrogatories.

(3) Finally, a careful reading of Interrogatory No. 36 of Plaintiff's Second Interrogatories and Defendant's Response thereto should indicate that the objection to the interrogatory is not in order (as described above). Additionally, Interrogatory No. 36 calls for considerable specific data that has not been supplied by Defendant, even in a form that suppresses the identity of the individuals involved.

Please contact me if you have any questions about the information we feel should be supplied in the form of supplemental answers to Plaintiff's First and Second Interrogatories. I would appreciate it if you would advise me, not only of whether you will be agreeable to providing this information, but also of the time table you would be agreeable to in this regard.

Thank you for your cooperation in this matter.

Very truly yours,

HICKS, GILLESPIE & JAMES

By: Hal K. Gillespie

HKG/ms

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

80-2300

Larry J. Woodard
Plaintiff-Appellant

v.

John O. Marsh
Defendant-Appellee

APPELLANT'S PETITION FOR PANEL REHEARING

INTRODUCTION

The Panel's September 15, 1981 opinion in our view, warrants rehearing. The truncated record caused by dismissal/summary judgment in the district court during the midst of Plaintiff's discovery[1] is responsible for much of this petition.

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[1] Failure to reverse the district court due to premature entry of summary judgment is a departure from settled Fifth Circuit law that summary judgment should not be granted without affording a Plaintiff a fair opportunity to obtain discovery. *Littlejohn* v. *Shell Oil Co.*, 483 F.2d 1140 (5th Cir. 1973). The Panel dealt with the matters raised by Woodard's due process claim that he was denied review as though Woodard had completed discovery and trial. On the contrary, discovery was ongoing with a Motion to Compel pending at the time summary judgment was entered. See Appellant's Brief, pages 18 and 27.

I. The Panel's Ruling that Woodard's Equal Protection Claim is not Reviewable Overlooks or Misapprehends Points of Fact and Law

A. Misapprehended Fact

The Panel Opinion (p.5) concerning reviewability of Woodard's equal protection claim states, "[W]e note that Woodard does not dispute that his failure to pass the test was an adequate basis for his discharge." Not so. Given the regulatory scheme, the failure to pass the test simply triggered the Faculty Board process; it was not the basis for discharge. Two other students failed the identical tests as Woodard and were kept (R. 724, 790). The findings of the Faculty Board indicate Woodard's failure to pass the test was a result of numerous factors beyond his control. See finding numbers 1 - 4 (R. 333). Woodard indeed disputes that failure to pass the test was an adequate basis for his discharge—had the Faculty Board not acted arbitrarily and capriciously and considered irrelvant matters plus matters unsupported by substantial evidence, there would have been no discharge.[2]

B. Overlooked or Misapprehended Law

We submit the Panel has misread *Mindes* v. *Seaman,* 453 F.2d 197 (5th Cir. 1971) in concluding that Woodard's equal protection claim is not reviewable. Footnote 1 indicates the Panel will not review a claim that the decisions of the various Army tribunals were "arbitrary, capricious, unsupported by

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[2] In *Johnson* v. *Reed,* 609 F.2d 784, 789-791 (5th Cir. 1980), this Court upheld a district court decision to void a "pass over" without finding that the selection board, if it had acted correctly, would have promoted Johnson. The military's action was deemed arbitrary and capricious where it "agreed that a cleaning of Johnson's selection folder was warranted, but . . . failed to permit the cleansing to have any effect on Johnson's career." *Id.* at 790.

substantial evidence, and erroneous in law." The Fifth Circuit, in *Hodges* v. *Callaway*, 499 F.2d 417, 423 (5th Cir. 1974) held that actions of such Army tribunals are

> subject to judicial reversal if . . . *arbitrary, capricious, unsupported by substantial evidence, or erroneous at law.* [citing cases] (emphasis added).

Interestingly, while footnote 1 suggests that the Panel will not consider allegations that the various Army tribunals acted arbitrarily and capriciously, pages 7 and 8 of the Panel Opinion deal with *Johnson* v. *Reed*, 609 F.2d 784 (5th Cir. 1980), where the Fifth Circuit upheld a district court's decision to review the passover and discharge of a military officer on grounds the military acted "arbitrarily and capriciously." The Panel's distinction between *Johnson* and Woodard is based upon a misapprehension of Woodard's case. According to the Panel Opinion (pages 7 and 8):

> The arbitrary action alleged in *Johnson*, however, was not the discharge decision itself but the consideration of patently incorrect records in making the decision. *Id.* at 787. The court noted that Johnson's case was "not one in which an officer is asking a court to interfere with the discretionary rating given the officer's performance." *Id.* at 789. Woodard's case is.

On the contrary, the arbitrary action complained of by Woodard is not the discharge decision; rather, it is the consideration of the Faculty Board, and thereafter, the reviewing authorities of patently (and admittedly) irrelevant matters and inaccurate, unsupported findings of the Faculty Board in making the decision.

The Panel Opinion's discussion (at page 7) of "the type and degree of anticipated interference with the military function" inherent in Woodard's equal protection claim reveals a misap-

prehension of the law. The Panel impliedly concedes that Woodard was denied discovery as to the other officers who were retained by the military by failing the same tests failed by Woodard. It is, of course, impossible to fully articulate the degree of arbitrariness and capriciousness involved in singling out one 2d Lt. for dismissal while retaining two other 2d Lts. for retention when the Plaintiff has been denied discovery as to the differences, if any, between his Faculty Board case and those of the other 2d Lts.[3]

Moreover, the Panel Opinion, at page 7, states:

> The possibility that a federal court may later require officers to explain the "rational basis" for distinguishing one trainee from another may deter military officers from relying on inherently subjective, though proper, criteria in favor of solely "objective" criteria that make it easier to demonstrate a "rational basis" when they get to court.

This analysis, we submit, is contrary both to *Hodges, supra,* and *Johnson, supra,* that approve reversal of arbitrary or capricious military decisions. The rationale is in conflict with *Mindes* itself. *Mindes* recognizes that "there will always be some interference when review is granted." 453 F.2d at 201. The Fifth Circuit has previously established that interference that consists of deterring military officers from relying upon arbitrary or capricious distinctions between otherwise identically situated trainees is a permissible interference with the military function. Put another way, Woodard's case does not seek to

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[3] As noted above, one 2d Lt. failed the same academic tests failed by Woodard and was retained and recycled without being required to appear before the Faculty Board (R. 790). Two other 2d Lts. failed the same academic tests failed by Woodard, appeared at the Faculty Board, and one, Joy Riley, was retained (R. 724) (Deposition of Joy Riley).

prevent the military from relying upon "inherently subjective, though proper, criteria" (Panel Opinion, page 7); it does seek to deter military officers relying upon arbitrary and capricious criteria. This, we submit, under *Mindes*, *Houges*, and *Johnson* is properly reviewable and Woodard's discovery should have been permitted.

II. The Panel Overlooked Or Misapprehended Fact And Law In Rejecting Woodard's Claim On The Merits

A. Overlooked Or Misapprehended Facts

Footnote 7 misapprehends Woodard's contentions by stating: "As for the administrative record, Woodard does not in any way challenge its correctness or completeness." Further, the Panel Opinion, at page 13, misstates Woodard's claims as follows:

> Wooard does not claim any specific prejudice from the failure to prepare a verbatim transcript; he does not claim the synopsis prepared was in any way inacurrate or unbalanced.

On the contrary, Paragraph XVIII of Plaintiff's First Amended Complaint asserts that due, in part, to lack of a verbatim transcript of testimony (at least his own testimony) before the Faculty Board, he was denied adequate review. See also Woodard's original Brief (pp. 41-42) and Woodard's Reply Brief (pp. 17-18). Neither Finding 10 relating to Woodard's alleged "numerous inconsistencies, apparent contradictions, and often vague responses" nor Finding 15, dealing with Woodard's alleged use of "profane and crude language" before the Faculty Board can be adequately reviewed on the present incomplete and inaccurate record. Woodard disputed both (R.

242-44).[4] The synopsis preapred as a substitute for a "verbatim transcript" is obviously incomplete and inaccurate as follows:

The Army submitted to the district court the military record of Larry Woodard (R. 166-685). According to Army answers to interrogatories (R. 786-87, Answer No. 17) the synopsis of Faculty Board proceedings consists of separate statements for each witness, found at R. 386-87, 389-90, 392-393, 397-298, 402-404, 406-407, 409-410, 412, 413, 415-416, 418-419, and 420-421. Woodard's military records indicate the sessions of the Faculty Board took place from March 29 to April 7, 1978, with Woodard present before the Board on March 29, April 6, and April 7, 1978 (R. 339). Woodard contends his testimony lasted eight hours. Despite this, the summary of his testimony is contained on four pages (R. 386-87, 389-90). We respectfully submit that a comparison of these pages of synopsis with the Findings concerning Woodard show the synopsis provided no legitimate basis for review of the Faculty Board's findings and recommendations; not a single item found by the Faculty Board Finding Nos. 7, 9, 10, 11, 14, or 15 is contained in the synopsis of Woodard's testimony. (R. 333-36). Patently, the review provided by the Appointing Authority was on the Findings

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[4] Finding No. 14, concerning Woodard's ability to articulate verbally could not be adequately reviewed on the basis of the present incomplete and inaccurate synopsis. Finding No. 11 was to the effect that Woodard was not factual in completing required military medical forms. Woodard's challenge to this Finding is contained at R. 242-43 and is *substantiated* by the decision of the Board for Correction of Military Records at R. 316. The record contains no verbatim question and answer version of Woodard's testimony to the Faculty Board upon which to evaluate the Faculty Board Finding Nos. 10, 11, 14, and 15. The synopsis summary of Woodard's testimony (R. 386-87, 398-90) supplies no support whatever to these findings.

themselves, but not of the evidence upon which the Faculty Board acted.[5]

These challenges to the completeness and accuracy of the record of the Faculty Board proceedings are, we submit, every bit as compelling, from a due process point, as those made in *VanderMolen* v. *Stetson,* 571 F.2d 617, 626 (D.C. Cir. 1977):

> Without a verbatim transcript of the Faculty Board's proceedings, it is of course impossible to review the findings. If, in fact, the Summary of the Faculty Board's findings mischaracterize VanderMolen's position, serious prejudice might have resulted. (citing cases).

Page 9 of the Panel Opinion indicates Woodard does not dispute the so-called "non-factual statement of Woodard when applying for a commission or the finding concerning the use of "profane and crude" language at the Faculty Board itself. Woodard indeed disputes these findings, and neither are indisputable from the evidence in the record. In fact, the "evidence in the record" concerning Woodard's testimony before the Faculty Board consists of 4 pages of summarization of Woodard's testimony, and those 4 pages did not contain a single profane or crude word used by Woodard. The record contains Woodard's explanation that his statement when applying for his commission was factual, since in his records, the indication of discharge had been corrected (R. 243). Woodard

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[5] When the district court entered summary judgment, Plaintiff's Motion to Compel Discovery as to Interrogatory No. 36 of Plaintiff's Second Interrogatories and Requests for Admission (R. 792-93) was pending. Interrogatory No. 36, if answered, would have provided an evidentiary basis concerning Woodard's inadequate review allegations. In absence of an answer to the interrogatory we submit it must be assumed the Appointing Authority reviewed the synopsis, not of any verbatim record.

also disputes that, in context, he used "profane and crude language" (R. 244). Neither disputed findings can be properly reviewed without a verbatim transcript.

Footnote 10 of the Panel Opinion, a product of the incomplete record resulting from premature summary judgment below, also misapprehends the facts. Woodard does not concede the Army will not release the reasons for his discharge. As a result of premature summary judgment, Woodard was denied discovery in this area, discovery that could have resulted in a fact finding by the district court that a significant danger of publication by the Army of the reasons for discharge existed. *See Sims* v. *Fox,* 505 F.2d 587, 866-87 (5th Cir. 1974) (dissenting opinion).

B. **Overlooked Or Misapprehended Law**

The Panel's analysis of Woodard's allegations that the Army failed to folow its regulations (Opinion, pages 8-12) is a sharp departure from military law articulated by the Fifth Circuit. Page 10 states:

> Woodard nevertheless contends that, had the Faculty Board not considered the four irrelevant findings, it might not have recommended discharge. The Appointing Authority, however, is not bound by the recommendation of the Faculty Board. [citing regulations] Thus, it is of no consequence whether the Faculty Board would have given a different recommendation had it not made the four irrelevant findings. It is empty to assert that the Appointing Authority, who himself disapproved the four findings at issue, did not give due regard to the fact that the Faculty Board's recommendation was based in part on these findings.

In sharp contrast to this method of analysis, in *Johnson* v. *Reed,* 609 F.2d 784, 790-91 (5th Cir. 1980), the Fifth Circuit approved the Court of Claims' rejection of a "but for" test in

Sanders v. *United States,* 594 F.2d 804 (Ct. Cl. 1979). *Johnson* v. *Reed* at 609 F.2d 791 dictates that there is no evidentiary basis on which to conclude, as did the district court below by summary judgment and the Panel on appeal, that the error or injustice was "truly harmless" so that Woodard would not have received a favorable recommendation from the Faculty Board in any event.[6] In short, the Panel's argument that consideration of irrelevant findings is of no consequence because a higher military authority is not bound by recommendations of the Faculty Board is contrary to the basic military law developed by the federal courts. In every instance in which error or injustice occurs short of the Board of Correcton of Military Records, the courts might hold, but have not, that errors were of no consequence because some higher military authority was not bound by those errors. *See e.g., VanderMolen* v. *Stetson, surpa.*

The second misapprehension of law in the Panel's opinion concerns Woodard's procedural due process claim. *Sims* v. *Fox,* 505 F.2d 857 (5th Cir. 1974) (en banc) *cert. denied,* 421 U.S. 1001 (1975) is distinguishable concerning Woodard's claim that the Army's action deprived him of "liberty." The Fifth Circuit has recently distinguished *Sims* v. *Fox* and held a liberty claim existed in *Swilley* v. *Alexander,* 629 F.2d 1018 (5th Cir. 1980). In *Swilley, id.* at 1022, the Fifth Circuit wrote:

> In the *Sims* case there was no question that the derogatory information placed in the Plaintiff's personnel file could never be disclosed to anyone but the Plaintiff. Also, there was no dispute that the derogatory information was true.

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[6] One trainee, with the same basic facts, but without some of Woodard's challenged, adverse findings was treated favorably the Faculty Board and the Appointing Authority. (Dep. of Joy Riley). Another studen who failed the same tsets was retained with no hearing (R. 790). Further, the Faculty Board had before it ample evidence extremely supportive of Larry Woodard. *See, e.g.* (R. 245-47, 252-53, 257-59, 261-276).

> To the contrary, in this case, however, there is absolutely not one shred of evidence in the record that the letter of reprimand will be "*merely present*" and kept "confidential." Moreover, the Appellees have conceded that the letter contains false information . . . The district court's resolution of these factual issues against Swilley, without any evidentiary basis, clearly violates both Rule 12(b)(6) and Rule 56 of the Federal Rules of Civil Procedure. Likewise, the district court's conclusions regarding Swilley's standing in the community and employment opportunities were also without evidentiary basis. [citing cases]

The *Swilley* analysis applies in full to the district court's resolution of factual issues against Woodard.[7]

CONCLUSION

Accordingly, Larry J. Woodard respectfully requests oral argument and relief as previously requested.

Respectfully submitted,

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& AGEE, P. C.
704E-1341 W. Mockingbird Lane
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214-630-8621

By: /s/ Hal K. Gillespie

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[7] The district court issued its summary judgment without addressing Plaintiff's Motion to Compel Discovery and Plaintiff's Response to Defendant's Motion to Stay Discovery and Brief in Support of Motion to Compel Discovery (R. 848-855). Plaintiff pointed out that a blanket protective order was improper, since additonal discovery besides that already propounded might be sought by Plaintiff (R. 851-52).

APPENDIX J

CONSTITUTION

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation For Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX K

The Mandamus Act

28 U.S.C. § 1361. Action to compel an officer of the United States to perofrm his duty

The district cours shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. Added Pub.L. 87-748, § 1(a), Oct. 5, 1962, 76 Stat. 744.

APPENDIX L

The Tucker Act

28 U.S.C. § 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

APPENDIX M

Findings And Recommendations Of The Faculty Board

Findings

1. That the conditions existing for retraining for the first retest examination 69745 were found to be of questionable adequacy;

2. That the circumstances surrounding the administering of the first retest of examination 69745 were found to be such that a questionable academic environment was created;

3. That the second retest of examination 69745 was administered with minimal retraining by members of the DOT Faculty;

4. That the second retest of examination 69745 was unique in that it retested all previously covered material, not just previously failed portions of the examination;

5. That 2LT Woodard did, without question, fail Tactical Intelligence Officer Course 78-35A-1;

6. That, based on his academic standing, 2LT Woodard has not demonstrated the ability to adequately perform in MOS 35A;

7. That 2LT Woodard was inducted into the US Army in January 1971 and was subsequently released approximately four months later in May 1971 for medical reasons;

8. That according to 2LT Woodard's testimony the medical problem was administratively reviewed in 1973 by a Department of the Army board. The review resulted in the decision that 2LT Woodard was medically fit for active duty;

9. That, in October 1973, 2LT Woodard enlisted in the US Army under a combat arms option. In March 1974, 2LT Woodard initiated action to be released from active duty due to nonfulfillment of his combat arms option contract by the US Army;

10. That a review of testimony and subsequent questioning of 2LT Woodard by members of the board revealed numerous inconsistencies, apparent contradictions and often vague responses. These characteristics displayed by 2LT Woodard causes doubt as to his ability to accurately report facts;

11. That testimony and records submitted as evidence indicated that in 1976 2LT Woodard, a then 25 year old individual with previous military experience coupled with experience in criminal law, was not factual in completing required military medical forms;

12. That testimony by personnel senior to 2LT Woodard indicates that he tries very hard to understand what he is doing, but he does have a problem with retention of material. Constant repetition is required in order for him to grasp concepts and even then he does not have a firm understanding of the overall situation;

13. That direct testimony by field experienced officers who are senior to 2LT Woodard indicated that in a learning environment 2LT Woodard does not have the ability or potential to be an officer in the US Army;

14. That 2LT Woodard did not display the ability to articulate verbally in a manner normally expected of a junior commissioned officer;

15. That 2LT Woodard's behavior before a board of field grade officers was characterized by several uses of profane and crude language. The use of such language indicates a lack of common sense and good judgment since 2LT Woodard's legal counsel based a large portion of his case on the use of profane and crude language by the DOT Faculty in formal faculty/student situations; and

16. That a review of all evidence presented to the faculty board strongly indicates that 2LT Woodard does not meet the minimum qualifications normally accepted as required by an officer of the US Army.

Recommendations

1. That 2LT Larry J. Woodard be relieved from active duty of the US Army; and

2. That 2LT Larry J. Woodard be discharged from his Reserve Commission.